

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2756 of 2017**

Arising Out of PS. Case No.-333 Year-2016 Thana- SASARAM NAGAR District- Rohtas

Vikash Kumar @ Vikash Kumar Singh, Son of Sudama Singh, resident of Mohania, P.S.- Karagahar, District- Rohtas at Sasaram.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Vikram Deo Singh-Advocate
For the Respondent/s : Mr. Binod Bihari Singh-A.P.P.

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

12-07-2019

Appellant Vikash Kumar @ Vikash Kumar Singh

has been found guilty for an offence punishable under Section 4(b)(II) of the Explosive Substances Act and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo R.I. for one month, additionally, by the learned Sessions Judge, Rohtas at Sasaram in connection with Sessions Trial No.247 of 2016 vide judgment of conviction dated 28.07.2017 and order of sentence dated 08.08.2017.

2. It is the case of the prosecution, which originated on the basis of the self-statement of Pawan Kumar (PW-4), Officer-in-Charge of Sasaram Town P. S. recorded on 08.03.2016 at about 11.15 P.M. disclosing therein that while he along with A.S.I. Satyendra Kumar Singh armed police



personnel comprising Hawaldar Motilal Hembram, Constable-242 Narendra Tiwari, Constable-229 Guddu Kumar, Constable-317 Santosh Kumar Sah were engaged in vehicle checking near S. P. Jain College Mor at about 10.00 P.M., they have seen one motorcycle coming from Dharmshala Chowk, which was signaled to stop. Occupant of the motorcycle tried to escape, but were apprehended and in presence of police Constable Narendra Tiwari and Motilal Hembram as no other independent person were present at that very moment, both the persons were searched out and during course thereof, from the possession of pillion rider, who disclosed his identity as Vikash Kumar, 50 detonators were recovered connected with small wire and for that, they failed to furnish documents. In likewise manner, they also failed to furnish license etc. relating to the motorcycle. Accordingly, seizure list was prepared, both the accused were taken into custody.

3. After registration of Sasaram (Town) P. S. Case No.333 of 2016, investigation commenced and after concluding the same, chargesheet has been submitted under Section 3/4 of the Explosive Substances Act whereunder trial also proceeded and concluded in a manner, the subject matter of instant appeal.

4. 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 produced in defence.

5. In order to substantiate its case, prosecution has examined altogether five PWs, who are PW-1, Satyendra Kumar Singh (member of the raiding team), PW-2, Narendra Kumar Tiwari (member of the raiding team as well as seizure list witness), PW-3, Motilal Hembrum (seizure list witness as well as member of the raiding party), PW-4, Pawan Kumar (informant) and PW-5, Ramanuj Singh (I.O.) as well as has also exhibited as Exhibit-1, signature of PW-2 over seizure list, Exhibit-1/A, signature of PW-3 over seizure list, Exhibit-1/B, seizure list, Exhibit-1/C, signature of accused Som Narayan over seizure list and Exhibit-1/D, signature of accused Vikash Kumar over seizure list, Exhibit-2, self-statement, Exhibit-2/1, endorsement, Exhibit-3, formal F.I.R., Exhibit-4, inculpatory extra-judicial confessional statement, Exhibit-5, F.S.L. Report and Exhibit-6, sanction report. As stated above, neither oral nor documentary evidence has been adduced on behalf of defence.

6. Heard learned counsel for the appellant as well as learned Additional Public Prosecutor and also gone through the record along with the judgment impugned.



7. From the judgment impugned, it is evident that there happens to be no reason assigned by the learned lower Court why and on what material, Section 3 of the Explosive Substances Act is not made out while Section 4 of the Explosive Substances Act has been made out. Furthermore, it is evident that learned lower Court while convicting the appellant under Section 4 of the Explosive Substances Act passed sentence relating to Section 4(b)(II) of the Explosive Substances Act, without having such identification during course of convicting.

8. Be that as it may, for better appreciation,

Section 4 of the Explosive Substances Act is quoted below:-

Section 4 in The Explosive Substances Act, 1908

1[4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property.—Any person who unlawfully and maliciously—1[4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property.—Any person who unlawfully and maliciously—"

(a) does any act with intent to cause by an explosive substance or special category explosive substance, or conspires to cause by an explosive substance or special category explosive substance, an explosion



of a nature likely to endanger life or to cause serious injury to property; or

(b) makes or has in his possession or under his control any explosive substance or special category explosive substance with intent by means thereof to endanger life, or cause serious injury to property, or to enable any other person by means thereof to endanger life or cause serious injury to property in India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished,—

(i) in the case of any explosive substance, with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

(ii) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.]

9. After going through the Section 4 of the Explosive Substances Act, it is evident that it comprises two parts, the first part speaks the possession with an intention to cause an explosion in order to endanger life or to cause serious injury to property while Sub-section-2 deals with possession



with intent by means thereof to endanger life or cause serious injury to property or enable any other person by means thereof, to endanger life or to cause serious injury to property in India. When the evidences have been gone through, the PW-1 the police personnel, PW-2 the arms constable-cum-seizure list witness, PW-3 the Hawaldar-cum-seizure list witness, PW-4 the informant and PW-5 the I.O., they have not substantiated the ingredients of Section 4 by way of stating that such illegal possession was with an intention to explode in order to cause injury to the life or property. On the other hand, the evidence is with regard to possession without license. After all, it is the burden upon the prosecution to substantiate its case. As stated above, save and except possession of explosive substance without license nothing more, at least by way of exploring much more, that the possession was with an ulterior motive to cause explosion in order to harm life and property, should have been. Lacking on that score, did not justify the finding. On the other hand, from the evidence, it is crystal clear that there happens to be no cross-examination at the end of the appellant in order to discredit the factum of recovery of 50 detonators without license and in likewise manner, challenging their status over seizure list. That being so, the recovery is not genuinely controverted.



Because of the fact that prosecution has not been able to substantiate the ingredients of Section 4 of the Act, on account thereof, the conviction and sentence recorded by the learned lower Court with regard thereto is hereby set aside.

10. The sole question now remains that once possession of 50 detonators without license is found duly substantiated, then under what provision of law the appellant is to be proceeded with and the answer is, the detonator is an explosive as defined under Section 4(d) of the Explosive Substances Act and as per Section 5, license was required to possess which the appellant was deficient one and in the aforesaid background, the appellant is to be convicted in accordance with Section 9(B)(b) of the Explosive Act.

11. Now, the question remains whether such conviction could be recorded as no charge has been framed and for that, Section 221(2) read with Section 215 of the Cr.P.C. is there to rescue.

12. In ***K. Prema S. Rao and another vs. Yadla Srinivasa Rao and others reported in A.I.R. 2003 (SC) 11***, it has been held:-

“22. Mere omission or defect in framing charge does not disable the Criminal Court from convicting the accused for the offence which is found to have



been proved on the evidence on record. The Code of Criminal procedure has ample provisions to meet a situation like the one before us. From the Statement of Charge framed under [Section 304B](#) and in the alternative [Section 498A, IPC](#) (as quoted above) it is clear that all facts and ingredients for framing charge for offence under [Section 306, IPC](#) existed in the case. The mere omission on the part of the trial Judge to mention of [Section 306, IPC](#) with 498A, [IPC](#) does not preclude the Court from convicting the accused for the said offence when found proved. In the alternate charge framed under [Section 498A](#) of IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The provisions of [Section 221](#) of Cr.P.C. take care of such a situation and safeguard the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence. [Section 221](#) of Cr. P.C. needs reproduction:-

"221. Where it is doubtful what offence has been committed-(l) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will



constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged. In the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

23. The provision of sub-section (2) of [Section 221](#) read with sub-section (1) of the said Section can be taken aid of in convicting and sentencing the accused No. 1 of offence of abetment of suicide under [Section 306](#) of IPC along with or instead of [Section 498A](#) of IPC.

24. [Section 215](#) allows criminal court to ignore any error in stating either the offence or the particulars required to be stated in the charge, if the accused was not, in fact, misled by such error or omission in framing the charge and it has not occasioned a failure of justice. See [Section 215](#) of Cr. P.C. which reads:-



"215. Effect of errors - No error in stating, either the offence or the particulars required to be stated in the charge, and no commission to state the offence or those particulars, shall be regarded any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

25. As provided in [Section 215](#) of Cr.P.C. commission to frame charge under [Section 306](#) IPC has not resulted in any failure of justice. We find no necessity to remit the matter to the trial court for framing charge under [Section 306](#) IPC and direct a retrial for that charge. The accused cannot legitimately complain of any want of opportunity to defend the charge under [Section 306, IPC](#) and a consequent failure of justice. The same facts found in evidence, which justify conviction of the appellant under [Section 498A](#) for cruel treatment of his wife, make out a case against him under [Section 306](#) IPC of having abetted commission of suicide by the wife. The appellant was charged for an offence of higher degree causing "dowry death" under [Section 304B](#) which is punishable with minimum sentence of seven years rigorous imprisonment and maximum for life. Presumption under [Section 113A](#) of the Evidence Act could also be raised against him on same facts



constituting offence of cruelty under [Section 498A, IPC](#). No further opportunity of defence is required to be granted to the appellant when he had ample opportunity to meet the charge under [Section 498A, IPC](#).”

13. Accordingly, appellant is found and held guilty for an offence punishable under Section 9(B)(b) of the Explosive Substances Act. The Section prescribes maximum sentence of two years with fine which may extent to Rs.3,000/- or with both. From the record, it is evident that the appellant happens to be under custody since 09.03.2016. That being so, even if sentenced to maximum period that will be within period of custody and so, no sentence of fine is inflicted against him, however, sentenced as period already undergone.

14. This appeal is disposed of in terms thereof. The appellant is under custody, whereupon is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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