

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2111 of 2019**

Arising Out of PS. Case No.-109 Year-2017 Thana- MANJHAGARH District- Gopalganj

RAHUL KUMAR SINGH Son of Paras Singh Resident of Village-
Bhojpurwa, P.S.- Manjhagarh, District- Gopalganj.

... .. Appellant/s

Versus

The State of Bihar Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 2437 of 2019

Arising Out of PS. Case No.-109 Year-2017 Thana- MANJHAGARH District- Gopalganj

GOLU MISHRA Son of Late Harender Mishra Resident of Village - Bhaluhi,
P.S.- Muffasil Siwan, Dist.- Siwan.

... .. Appellant/s

Versus

The State of Bihar Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 2111 of 2019)

For the Appellant/s : Mr. Bakshi S.R.P. Sinha, Sr. Adv.
Mr.Lokesh Kumar Singh

For the Respondent/s : Mr.Binod Bihari Singh

For the State : Mr. Jharkhandi Upadhyay

(In CRIMINAL APPEAL (SJ) No. 2437 of 2019)

For the Appellant/s : Mr.Mohammad Sufyan

For the Respondent/s : Mr.Syed Ashfaque Ahmad

**CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT**

Date : 12-12-2024

Re:-Cr. Appeal (S.J.) No. 2111 of 2019.

The present appeal has been filed against the



judgment and order passed by learned Additional Sessions Judge-cum-Special Judge, Gopalganj in Tr. No. 09 of 2017 arising out of Manjhargarh P.S. Case No. 109 of 2017 dated 01.03.2019 and 8.3.2019 respectively by which the appellant has been found guilty for the offence under the following:-

Under Section 399 of the Indian Penal Code, the appellant has been sentenced to undergo rigorous imprisonment for seven years and fine of Rs. 10,000/- and in default of non-payment of fine, the appellant will have to undergo additional imprisonment for two months.

Under Section 402 of the Indian Penal Code, the appellant has been sentenced to undergo rigorous imprisonment for five years and a fine of Rs. 5,000/- and in default of non-payment of fine, the appellant will have to undergo additional imprisonment for one month.

Under Section 414 of the Indian Penal Code, the appellant has been sentenced to undergo imprisonment for two years.

Under Section 25(1-B)a of the Arms Act, the appellant has been directed to undergo imprisonment for two years and a fine of Rs. 2,000/- and in default of non-payment of fine, the appellant will have to undergo additional imprisonment for a period of one month.

Under Section 26 of the Arms Act, the appellant has been directed to undergo imprisonment for two years and a fine of Rs. 2,000/- and in default of non-payment of fine, the appellant will have to undergo



additional imprisonment of one month.

Under Section 20(ii)(B) of the N.D.P.S. Act, the appellant has been directed to undergo rigorous imprisonment for ten years with a fine of Rs. 1 lakh and in default of non-payment of fine, the appellant will have to undergo additional imprisonment of six months and all the aforesaid sentences under various Sections will run concurrently.

2. The present case has been registered on the basis of the self statement of one Suresh Kr. Yadav, Police Office of Manjhagarh Police Station and as per him, he received information through call from the Superintendent of Police concerned that some miscreants were roaming at NH 28 with fire arms. The police party proceeded from the police station and upon reaching the National Highway, started checking the vehicles crossing from the National Highway. During the course of checking the vehicles, the police found that 6 persons riding on three motorcycles were coming from Gopalganj and when the police stopped them, one of them started fleeing away and succeeded in escaping and all other miscreants i.e. other five persons were apprehended by the police and upon search, one loaded country made pistol, a live cartridge and a motorcycle was recovered from the possession of the appellant. Ganja was recovered from the possession of co-accused Golu Mishra. The



motorcycles and mobiles were also recovered from the possession of other accused persons and accordingly, the seizure list was prepared and FIR bearing Manjhagarh P.S. Case No. 109 of 2017 was instituted for the offences under Sections 399, 402, 414 of the Indian Penal Code, under Sections 25(1-B)d, 26, 35 of the Arms Act and also under Section 20(ii)(B) of the N.D.P.S. Act.

3. After investigation, the police submitted the charge-sheet and cognizance was taken under the aforesaid Sections. After cognizance, charges were framed and trial was conducted. In the trial, the appellant was found guilty and sentenced under the various Sections of the Indian Penal Code, Arms Act and N.D.P.S. Act as mentioned above. One Golu Mishra has been convicted with the appellant and other accused were found juvenile and therefore their trial was separated and sent to Juvenile Justice Board.

4. The prosecution has examined altogether 16 witnesses to prove its case. P.W. 1 and P.W. 2 namely Rajesh Yadav and Sonu Kumar Yadav are the driver of the vehicles. P.W. 3 namely Jain Prasad Singh is ASI of Manjhagarh Police Station. P.W. 4 namely Suresh Kumar Yadav (ASI) is the informant of the case. P.W. 5 and P.W. 7 are the ASI of the



Police Station. P.W. 6 and P.W. 8 are the constables. P.Ws. 9, 10 and 11 are the chowkidars. P.W. 12 is a constable. P.W. 13 namely Brahmdeo Pandit (ASI) is the investigating officer of the case. P.W. 14 is the S.I. P.W. 15 is the Circle Officer and P.W. 16 is the Ballistic Expert.

5. It has been submitted by the learned counsel for the petitioner that the prosecution has failed to prove the charges under the N.D.P.S. Act as the recovery of Ganja was not made from the possession of the appellant and it was much less than the commercial quantity. The seizure was not done in accordance with law and the sample was also not collected as per prescribed procedure.

6. It has further been submitted by the learned counsel for the petitioner that mere presence of the appellant on the motorcycle along with his companion will not establish the allegation that he was there for the purpose of dacoity. He also submits that no independent witness has come to support the occurrence and the witnesses examined on behalf of the prosecution are all police officials and there is no evidence of the motorcycle being a stolen one.

7. It has further been submitted by the learned counsel for the petitioner that there is no allegation that anybody



has complained about the theft of motorcycle, in fact, the appellant was called by the police and when the appellant went there, he was taken into custody and was remanded in the present case.

8. It has further been submitted by the learned counsel for the petitioner that the prosecution of the appellant under the Arms Act is also not in accordance with law as the seized arm was never produced before the District Magistrate.

9. Learned counsel for the petitioner further submits that the seizure list, which was the basis of the conviction of the appellant has not been prepared in accordance with law and no independent witness has signed the seizure list. He also submits that mere recovery of fire arm, mobile phone or Ganja, it cannot be said that the accused persons were planning to commit dacoity and therefore the offence under Sections 399 and 402 are not being made out. He also submits that the finding of the trial Court that the appellant is the member of the gang involved in loot is completely baseless and there is nothing to prove that the appellant was involved in any common intention or conspiracy to commit loot.

10. Learned counsel for the State Shri Jharkhandi Upadhyay has supported the prosecution case and has submitted



that the impugned judgment is a well reasoned judgment. He further submits that the witnesses examined in the case, though are police officials but they have no enmity with the appellant and their evidence is unimpeccable.

11. Learned APP for the State further submits that the prosecution has proved its case beyond reasonable doubt and therefore the impugned judgment may not be interfered with.

12. I have heard and considered the submission of the parties.

13. As per the prosecution case, the police intercepted the petitioner along with other accused person namely Golu Mishra riding on the same motorcycle. One loaded country made pistol and one live cartridge was recovered from the possession of the petitioner. From the possession of Golu Mishra, ganja was recovered from a plastic bag. The police prepared the seizure list, called the Magistrate to make the seizure before the Magistrate as the same is essential for the purpose of NDPS Act.

14. I have examined the seizure list, which shows the seizure of the country made pistol and live cartridge from the appellant. The seizure list (Exhibit 1/1) does not bear the signature of the appellant.



15. P.W.- 1 one Rajesh Yadav is seizure list witness. Though, he has identified his signature on the seizure list prepared after seizure of loaded country made pistol and live cartridge from the appellant but in his cross-examination he has said that he had only signed the seizure list and the materials which were mentioned in the seizure list, were not kept there and he has signed the seizure list after stopping his car.

16. Sonu Yadav is the second seizure list witness, who has signed the seizure list and has been examined as P.W. 2. He says that on 25.6.2017, two seizure list were made on which he has put his signature which were exhibited as 1/2 and 1/3. In his cross-examination, he says that nothing was recovered by the police in his presence. He also says that he was going on his car and the police stopped him and took his signature.

17. P.W. 15 is one Rajesh Kumar, the C.O. who has said that on 25.6.2017, he was posted as C.O., Manjagarh. He was informed by the SHO, Manjagarh that some anti-social elements were caught by the police and from them Ganja, country-made pistol and live cartridge was recovered. Though, in his examination-in-chief, P.W. 15 has said that the seizure list was prepared in his presence but in his cross-examination, he has said that when he reached the place of occurrence, the police



had already seized and kept the alleged materials. He says that nothing was recovered from the accused. He further says that the seizure list witnesses reached the place of occurrence after P.W. 15 reached there. The seized materials were not recovered in presence of the seizure list witnesses. He further says that he had not signed on the seal of the seized materials, though, they were sealed in his presence. He also says that the Ganja was weighed in his presence but from where the weighing machine was brought for weighing the Ganja was not clear. He also says that after his statement, he had gone to his residence and not to the police station. He then says that sample of Ganja was not sealed. He had not sealed the sample but it was done by the police officer and he had not signed any seal of the seized materials.

18. From the evidence of PW-1, 2 and 15, the seizure of the country made pistol and live cartridge from the appellant and seizure of Ganja from other co-accused Golu Mishra is not proved.

19. The prosecution has not been able to prove that the seizure was made from the appellant or the co-convict who were travelling together on the motorcycle. There is not evidence brought on record that the motorcycle on which the



appellant was travelling was a stolen one.

20. D.W.-1 has proved the report of the then SHO, Manjhagarh to show that the seized motorcycle bearing Registration No. BR 28N 9475 is registered in the name of one Rahul Kumar.

21. The Hon'ble Supreme Court in the case of ***Chaturi Yadav and Ors Vs. State of Bihar*** reported in **1979 (3) SCC 430**, while considering the conviction of the appellants under Section 399 and 402 of the Indian Penal Code has held as follows:-

3. *One of the appellants was found to be in possession of a gun and live cartridge and others had merely one live cartridge each in their pockets.*

4. *The Court below have drawn the inference that the appellants were guilty under both the offences merely from the fact that they had assembled at a lonely place at 1 A M. and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the prosecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned Counsel for the appellants is well founded and must prevail.*



The evidence led by the prosecution merely shows that eight persons were found in the school premises. Some of them were armed with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 A.M. does not, by itself, prove the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself, has in its judgment, observed that the school was quite close to the market, hence it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing a dacoity and would take such a grave risk. It is true that some of the appellants who were caught hold of, by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being clearly inadmissible has to be excluded from consideration. In this view of the matter, there is no legal evidence to support the charge under Section 399 and 402 against the appellants. The possibility that the appellants may have collected for the purpose of murdering somebody or committing other offence cannot be safely eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court.

22. In the present case also, the appellant along with other co-convict have been held guilty for the offence under Sections 399, 402 because they were caught at the



National Highway at around 1 P.M. i.e. in the day time.

23. The evidence laid by the prosecution shows that 5 persons, including the appellant were caught on the spot on three motorcycles and one co-accused had fled away. Some of them were armed with country made weapon including the appellant. Only because the accused persons along with appellant were intercepted by the police and were found armed will not prove that they were travelling for the purpose of committing dacoity or for planning that job.

24. Moreover, the appellant and others were travelling on the national highway in day time and for committing dacoity, they could not have travelled in the broad day light on the national highway. There is no evidence to support the charge under Section 399 and 402 against the appellant and therefore the conviction of the appellant under various Sections of Indian Penal Code, Arms Act and N.D.P.S. Act cannot be sustained.

25. Accordingly, this appeal is allowed and the judgment and order passed by learned Additional Sessions Judge-cum-Special Judge, Gopalganj in Tr. No. 09 of 2017 arising out of Manjhargarh P.S. Case No. 109 of 2017 dated 01.03.2019 and 8.3.2019 is hereby set aside.



Re:-Cr. Appeal (S.J.) No. 2437 of 2019.

This case has been wrongly listed today as the same has been already withdrawn.

(Sandeep Kumar, J)

Vikas/-

AFR/NAFR	NAFR
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