IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.1137 of 2016

Arising Out of PS. Case No.-26 Year-2002 Thana- SIWAIPATTI District- Muzaffarpur

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Manoj Rai, Son of Bishwanath Rai, Resident of Village - Panapur, P.S. Siwaipatti, District – Muzaffarpur.

... ... Petitioner/s

Versus

The State Of Bihar

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr. S.K. Ranjan, Adv.,
Mr. Vasant Vikas, Adv.
For the State : Mr. Sunil Kumar Pandey, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI

ORAL JUDGMENT

Date : 18-04-2024

Heard learned Advocate for the petitioner as well as learned APP for the State.

2. The instant revision is directed against the Judgment and order dated 16th August, 2016, passed by the learned Additional Sessions Judge-III, Muzaffarpur in Cr. Appeal No. 116 of 2008, whereby and whereunder the petitioner's appeal was dismissed and the Judgment and order of conviction and sentence, passed by the learned Judicial Magistrate, Ist Class, Muzaffarpur, on 29th November, 2008, convicting the petitioner for the offence punishable under Section 25 (1-B) (a) read with Section 26 of the

Arms Act and sentencing the petitioner with imprisonment for a term of one year with fine of Rs. 1,000/-, in default further imprisonment for one month.

3. Siwaipatti P.S. Case No. 26, dated 15th June, 2002 was registered under Section 25(1-b)/26 of the Arms Act on the basis of a suo motu complaint filed by the Officer-in-charge of the said Police Station, namely Prem Shankar Singh, alleging, inter alia that on 15th June, 2002, he along with other members of Police force and village Chowkidars went to village Koharia to conduct investigation of the Siwaipatti P.S. Case No. 26 of 2002. After completion of part investigation and search, the Police party was returning to the Police Station at about 8:30 P.M. When they were proceeding by Police Jeep towards village Ghosaut, the informant saw a person proceeding towards South with a rifle in his hand. The Police Officer asked him to stop, but seeing the Police party he tried to flee away. Immediately, the informant directed the members of the force, who were with him, to chase the said person. The Police party chased him and apprehended the said person. Hearing hue and cry, local people assemble at the spot. The Police Officer/informant called two persons amongst the villagers, who were present at the spot. To witness the process of search and seizure one Mohan Paswan and Rajesh Kumar

volunteered themselves. The informant conducted search of the apprehended person in presence of above named independent witnesses and recovered one country made rifle loaded with 1.315 bore cartridge from his hand. The said rifle was country made. The apprehended person could not produce any document in support of his possession in respect of the said firearm. The Police Officer also seized one live cartridges of 1.315 bore from his right hand side pocket of his pant in present of the independent witnesses. The said firearm and ammunition were seized and the accused was formally arrested. Then they returned to the Police Station and Officer-in-charge of the said Police Station submitted a written complaint against the accused, on the basis of which above named police case was registered.

4. Subsequently, the investigation was taken up by PW.5. During investigation, he examined witnesses visited the spot, send the seized firearm and ammunition to the expert to ascertain as to whether the seized material is a country made rifle or not and whether it was in working condition or not. After getting the expert's report Police Submitted Charge-sheet.

5. Trial of the case was conducted by the learned Judicial Magistrate, Ist Class at Muzaffarpur and by his Judgment dated 29th November, 2008, the accused was convicted and

sentenced to suffer rigorous imprisonment for two years for committing offence under Section 25 (1-B) (a) of the Arms Act. The accused was also directed to pay fine of Rs. 1,000/-, in default to suffer imprisonment for further period of one month.

6. The accused preferred an appeal before the learned Sessions Judge at Muzaffarpur. The said appeal was finally heard by the learned Additional Sessions Judge-III, Muzaffarpur.

7. By his Judgment dated 16th August, 2016 in Cr. Appeal No. 116 of 2008, the learned Additional Sessions Judge maintained the order of conviction, modified the sentence directing that the petitioner shall suffer rigorous imprisonment for one year. The sentence of payment of find was maintained by the learned Additional Sessions Judge.

8. The order of the appellate court was under challenge in the instant revision.

9. It is submitted by the learned Advocate for the petitioner at the outset that the learned Additional Sessions Judge in the impugned Judgment mechanically affirmed the Judgment of the trial court without independent assessment of evidence on record. Therefore, the learned counsel for the petitioner first refers to the Judgment of the trial Court.

10. It is submitted by him that during trial prosecution examined seven witnesses. Amongst them PW.1 is a seizure list witness. PW.2 and PW.3 are Chowkidars, who accompanied the Police Party to the spot. The prosecution claimed that search, recovery and seizure list firearm and ammunition were made in presence of P.W.2 and P.W.3. PW.4 is the Arms expert, who examined the said firearm. PW.5 is the Investigating Officer of this case. PW.6 is the Assistant Sub Inspector of Police attached to the Siwaipatti Police Station at the relevant point of time. He received the complaint from the Officer-in-charge and registered Siwaipatti P.S. Case No. 26 of 2002. PW.7 is the informant, who was the Officer-in-charge of the Siwaipatti P.S. at the relevant point of time.

11. It is also pointed out by the learned Advocate for the petitioner that two witnesses were examined in support of defence. The learned Advocate for the petitioner first submits with regard to evidence adduced by the witnesses on behalf of the prosecution that P.W.1 Mohan Paswan was cited as a seizure list witness by the prosecution, but during evidence he did not support the prosecution case. He clearly states that Police Officer obtained his signature on a blank paper at the spot on 15th June, 2002. He did not see any writing on the seizure list. No firearm or ammunition

was seized from the possession of the accused in his presence. It is also submitted by the learned Advocate for the petitioner that PW.2 and 3, who are the Chowkidars under the Police Department also did not support the prosecution case. From their evidence it is crystal clear that they did not apprehend the accused. It appears from their evidence that when the members of the force were chasing the accused, they were sitting in Police Jeep, so they personally did not conduct any raid to arrest the accused. However, it is stated by them in course of their evidence that after apprehension, the accused was brought in front of the Police Jeep and the Officer-in-charge of the Police Station seized one firearm and two ammunitions from the possession of the accused.

12. It is further submitted by the learned Advocate for the petitioner that other witnesses namely P.W.4, P.W.5 and P.W.6 are formal witness. They did not see the actual incident of arrest of the accused and recovery of firearm and ammunition from the possession of him. P.W.4 is an Arms expert, who opined that the seized firearm was in working condition. The firearm was produced during trial, but the trial court recorded in his Judgment that the seized firearm was produced in two pieces. The butt of the rifle was not attached to its barrel and trigger.

13. It is pointed out by the learned Advocate for the petitioner that search and seizure was not supported by the independent witness. No Police Officer or Police personnel, who actually apprehended the accused was examined by the prosecution. The firearm was produced in broken condition. There is no explanation as to whether the firearm that was produced before the trial court during trial is the seized firearm, which was recovered from the accused. The prosecution did not come forward with plausible explanation as to whether the firearm was broken in Police Malkhana or it was seized in broken condition.

14. On the other hand, it is pointed out by the learned Advocate for the petitioner that the accused/petitioner examined two independent witnesses during trial. Both the witnesses stated that the accused had some dispute with the local M.L.A. Under the instruction of the local M.L.A., Police arrested him and implicated him in a false case under the Arms Act and the accused never possessed any illegal firearm and ammunition as alleged by the prosecution.

15. Learned Advocate for the petitioner submits that the prosecution failed to comply with the provision contained in Sub-section 4 of Section 100 of the Cr.P.C. There is nothing on record that before making a search, the Officer or other person about to

make the search called upon the independent witnesses and respectable inhabitants of the locality in which the place to be search is situated or any other locality or of any locality if no such inhabitants of the said locality is available or is willing to a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

16. I am not in a position to accept such contention made by the learned Advocate for the petitioner relying on Section 100 (4) of the Cr.P.C. Simply for the reason that Section 100 relates to search of a closed place or any building, warehouse etc. In the instant case search was made in open field. According to prosecution some people assembled hearing the hue and cry at the time of apprehension of the accused. Two of them were called and seizure was made in presence of them. Thus, non-compliance of Section 100 (4) of the Cr.P.C. does not make the search and seizure of firearm illegal.

17. Similarly, the Judgment of this Court in the case of ***Lakhindra Rai Vrs. The State of Bihar***, reported in (***2007) 3 PLJR 362*** is also not applicable because in the said report a decision, a Coordinate Bench has dealt with provision of Section 50 of the Narcotics Drugs and Psychotropic Substances Act, 1985, where special provisions are laid down under the Special Act as

the prerequisite of search in a case under the N.D.P.S. Act. The decision of the Division Bench of this Court in ***Guddu Rai Vrs. The State of Bihar***, reported in (***2012) 4 PLJR 1064*** is also not applicable under the facts and circumstances of this case because in the said reported decision the Police officer failed to get the seized firearm examined by a ballisticate part. Question of examination of a firearm by a ballisticate part arises when the firearm is used for firing a shot to a person. In the instant case there was no such case of firing made out by the prosecution.

18. In ***Guddu Rai Vrs. The State of Bihar***, the Division Bench of this Court relied upon the decision of the Hon'ble Supreme court in ***Nachhattar Singh & Ors. vrs. State of Punjab***, reported in ***AIR 1976 SC 951,*** where recovery was made form the accused person and it was held by the Apex Court that the recovery ought to have been proved by examining the witnesses, who had witnessed the recovery.

19. The learned A.P.P. In-charge has supported the prosecution case as well as the decision rendered by the trial court and affirmed by the appellate court in course of his submission.

20. Having heard the learned counsels for the parties and on perusal of the material on record, I like to record at the outset that in revision, it is not permissible for a revision court to

examine and scan the evidence on record adduced by the prosecution and defence until and unless a gross perversity is made out against the petitioner. In the instant case, going through the lower court record as well as Judgments passed by the trial court and the appellate court, this Court is of the view that this is one of the rare cases where the examination of evidence by both the courts below were perverse.

21. Let me assign the reasons. The trial court observed that PW.1 was did not support the prosecution case, but surprisingly held that he was present at the place of occurrence on the date and time of incident. Even assuming that P.W.-1 was present at the place of occurrence does it prove that he was a seizure witness when he specially submitted that his signature was obtained by the Officer-in-charge of the Police Station on a blank paper. It is important to note that PW.1 was not declared hostile by the prosecution. Therefore, the evidence of PW.1 ought to have been made applicable against the prosecution and it ought to have been held that search and seizure of firearm was not made in present of any independent witness.

22. I am not unmindful to note that when search and seizure is made on an open filed, it may not be possible for the Police Officer to find out independent witness. There is no harm if

the search and seizure was made in presence of other Police Officers, who took part in the raid. Not a single Police Officer was examined in this case on behalf of the prosecution to support the raid and search and seizure. The Officer-in-charge, who allegedly seized a firearm did not take any signature of any of the Police Officers, who accompanied him. The Chowkidars (PW.-2 and 3) stated on oath that during apprehension of the accused they were sitting inside the Police vehicle.

23. Another important aspect of the matter is that the Officer-in-charge did not prepare any label in respect of the seized articles. The seized firearm was not sealed at the spot or even at the Police Station without identification label and official seal of the firearm, how could P.W.-4 state in his report that the firearm, which was recovered from the possession of the accused was placed before him for examination. There is no seal and label with signature of the accused and the witnesses on the firearm and cartridges to prove that those articles were seized from the possession of the accused.

24. Under such circumstances, I am not in a position to accept the report of the Arms expert in connection with this case.

25. Both the courts below convicted the accused under Section 25 (1-B) (a) of the Arms Act. Practically, the penal

provision was wrongly recorded by both the courts below. Section 25 (1-B) (a) states that whoever acquires, has in his possession or carries any firearm or ammunition in contravention of Section 3 shall be punishable with imprisonment for a term which shall not be less than two years but it may extend to five years and shall also be liable to fine. Therefore, for all practical purposes, both the courts below convicted the accused under Section 25 (1-B) (a). The penal provision states minimum punishment of two years. When minimum punishment is prescribed by a penel statute, the appellate court cannot pass any order of punishment less than minimum punishment prescribed by the statute. On this score also the impugned Judgment is illegal and inoperative.

26. For the reasons stated above, I find that both the courts below acted illegally and with material irregularity in convicting and punishing the accused for the offence punishable under Section 25 (1-B) (a) of the Arms Act. It is unfortunate that the accused person/petitioner is in Correctional Home for about seven months. The petitioner be acquitted and released from the Correctional Home at once.

27. The learned Advocate for the petitioner is at liberty to act on the server copy of this Judgment.

28. The instant revision is accordingly allowed on context.

(Bibek Chaudhuri, J)

pravinkumar/-

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