

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.691 of 2007

Arising Out of PS.Case No. -0 Year- null Thana -null District- DARBHANGA

Uchit Mahto son of Bisheshwar Mahto, resident of village-Athar Ghot, P.S.-Baheri,
District- Darbhanga

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. R.P.Singh, Advocate

Mr. Vivekanand Singh 1, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, Additional Public Prosecutor

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

C.A.V. JUDGMENT


Date: 30.06.2015

This appeal is directed against the judgment and order dated 30th May, 2007 passed by the learned Additional District and Sessions Judge (Fast Track Court –IV), Darbhanga in Sessions Trial No.16 of 2005. By the impugned order, the sole appellant has been convicted under section 4 of the Indian Explosives Substances Act, 1908 (for short ‘the Act of 1908’) and sentenced to undergo rigorous imprisonment for seven years and a fine of Rs.10,000/- and, in default thereof, to further undergo imprisonment for one year.

2. P.W.7 Anup Kumar, S.H.O., Baheri Police Station recorded his self statement at 6.10 a.m. on 9.4.2004 pursuant to which Baheri P.S.Case No.35 of 2004 was registered under sections 212, 216 and 120B of the Indian Penal Code (for short ‘the IPC’), section 17 of the Criminal Law Amendment Act (for short ‘the CLA Act’)

and sections 3 and 4 of the Act of 1908.

3. In the FIR, it has been alleged by the informant that on 8.4.2004 at 8.30 p.m., the Deputy Superintendent of Police (Headquarters), Dilnawaj Ahmad, directed him to reach at Sonki police outpost. In obedience to the direction, he reached at the Sonki police outpost at about 9.30 p.m. along with Assistant Sub Inspector of Police, Mudrika Yadav and Police Constables, namely, Bhushan Prasad Singh, Akhileshwar Yadav, Kari Lal Yadav, Rajeshwar Rai, Shankar Prasad Singh and Mustafa Kamal and said that the Deputy Superintendent of Police (Headquarters), Sub Inspector-cum-Officer Incharge Kewati police station, S.A.Hashmi, Incharge Sonki police outpost, Sub Inspector Ajay Kumar, Constable Sunil Kumar, A.S.I. of CISF, Ravi Lochan Mandal and other police personnel were present there from before. The Deputy Superintendent of Police told them that as per information some extremists of banned terrorists organization Moist Communist Centre (for short 'MCC') have assembled at the house of the appellant Uchit Mahto in village Arhargot. Under his instruction, a raiding party was constituted to nab the miscreants. Accordingly, the police team proceeded towards village Arhargot. When the police team reached near the house of the appellant, at about 2 a.m., some stray dogs started barking and some persons started running away. Though others managed to escape, but one of



them was overpowered by the raiding party. On seeing the police party, some residents of the locality arrived there and in the presence of two independent witnesses, namely, Parmeshwar Pandit (P.W.2) and Chandeshwar Pandit (P.W.5), a search was conducted in the house of the appellant. A plastic bag hidden in a room caught attention of the raiding team. On opening the bag, it was found that 100 empty detonators, 9 detonators with fuse wire and 2 meters electric wire were kept in a carton. No plausible explanation could be given by the appellant in respect of those articles. On inquiry, he stated that members of the MCC party used to come to his house and even on that day they had come to meet him. He further disclosed that out of them he could recognize Baiju @ Govindjee, Santosh @ Manoj Lal Deo and Amar Lal Deo by name. He revealed that the aforesaid articles recovered from his house were given to him by the members of the MCC organization in order to cause land mines blast during the election time which was scheduled to be held shortly.

4. It has further been stated that the articles so recovered were seized in accordance with law and a copy of the same was also handed over to the appellant.

5. On the basis of the aforementioned allegations, the first information report (for short 'the FIR'), was registered and investigation was handed over to P.W.1 Ram Singar Singh, who

investigated the case and on completion of investigation submitted charge-sheet in the case. The learned Magistrate took cognizance of the offence and after complying with the mandatory provisions of section 207 of the Code of Criminal Procedure (for short 'the Cr.P.C.'), committed the case to the court of sessions for trial.

6. After commitment, the trial court charged the appellant under sections 212, 216 and 120 of the IPC, section 7 of the CLA Act and sections 3 and 4 of the Act of 1908 to which he pleaded not guilty and claimed to be tried.

7. Accordingly, the trial commenced. In course of trial, altogether 12 witnesses were examined on behalf of the prosecution. Apart from the oral testimony of the witnesses, certain documents were also proved on behalf of the prosecution in support of the charges. After closing the prosecution evidence, statement of the appellant was recorded under section 313 of the Cr.P.C. in which he pleaded his innocence. However, no witness was examined on behalf of the defence during trial.

8. On conclusion of the trial, the court below held the appellant guilty of the charge under section 4 of the Act of 1908 and sentenced him in the manner stated hereinabove.

9. Learned counsel for the appellant has submitted that the impugned judgment passed by the court below is erroneous on facts

and law both as it failed to consider :

(a) That the two seizure list witnesses, namely, P.W.2 Parmeshwar Pandit and P.W.5 Chandeshwar Pandit have completely denied the seizure of any article from the house of the appellant in their presence;

(b) That Ext.-7 (seizure list) does not contain signature of the appellant and, hence, it is not in accordance with the statutory mandate provided under sub section (6) of section 100 of the Cr.P.C.;

(c) That the prosecution has failed to produce any reliable evidence of the seizure of articles in question so as to warrant the conviction under section 4 of the Act of 1908;

(d) That there is no independent witness in the case, except the two seizure list witnesses, who have been declared hostile by the prosecution;

(e) That no sanction was obtained prior to the prosecution of the appellant under section 4 of the Act of 1908 which has completely vitiated the trial;

(f) That the members of the raiding party, who have deposed before the court, have made contradictory statements to each other;


(g) That *Prima facie*, the detonators and fuse wires alleged to have been recovered from the house of the appellant could not be termed as explosive substances in absence of any expert opinion; and,

(h) That there is nothing on record to suggest that the alleged articles were ever seized by the police from the house of the appellant as the incriminating articles were never produced in the court.

10. Per contra, learned counsel for the State has submitted that the trial court has correctly appreciated the law and facts involved in the case. There is evidence to show that on confidential information received by the police regarding shelter having been given to the terrorists of MCC, the house of the appellant was raided and, on search, large quantity of components of high power country made bomb were recovered. The articles so seized were sent for examination to the forensic science laboratory. The report submitted by the forensic science laboratory corroborates the fact that the seized articles were components of high power country made bomb and are also used in mines for blasting purposes. According to him, the prosecution has proved its case beyond reasonable doubt against the appellant by leading cogent and reliable evidence during trial.

11. I have carefully considered rival submissions and perused all the relevant materials.


12. Coming to the evidence adduced at the trial, I notice that P.W.7 Anup Kumar, informant of the case, has reiterated the allegations made in the FIR in his examination-in-chief. He has



proved the formal FIR, written report and seizure list which have been marked as exhibit 5, 6 and 7 respectively. In cross-examination, he has stated that the alleged search and seizure were made in the night intervening between 8.4.2004 and 9.4.2004. He deposed that since the seized articles were neutralized after test, the same could not be produced in the court. He has also admitted that though the seizure list was prepared by him and a copy of the same was delivered to the appellant but due to inadvertence signature of the appellant could not be taken over it. In answer to a particular question made by the defence, he could not reply as to who carried the seized articles to the police station from the house of the appellant.

13. A perusal of the seizure list would make it evident that the same was prepared at 2.45 a.m. on 9.4.2004 at the house of the appellant. The same does not contain the signature of the appellant. It does not even contain endorsement to the effect that a copy of the same was delivered to the appellant.

14. P.W.1 Ram Sringer Singh, investigating officer of the case, has proved the signature of P.W.7 Anup Kumar on the formal FIR and the endorsement made over it by which he was appointed investigating officer of the case which has been marked as Exhibit 1 and 2 respectively. He has stated that he made inspection of the place of occurrence, recorded the statement of the witnesses, sent the seized



articles for forensic test to the Forensic Science Laboratory, Muzaffarpur and after completing the investigation submitted charesheet in the case. In cross-examination, he has stated that he was not a member of the raiding team and when the seized articles were delivered to him, he had deposited them in the Malkhana of the police station. According to him, when the articles were sent to the forensic laboratory for test they were sealed in presence of the Officer Incharge of the police station.

15. The two seizure list witnesses, namely, Parmeshwar Pandit (P.W.2) and Chandeshwar Pandit (P.W.5) have stated that their respective signatures were procured by the police on blank sheet of paper under coercion. They have been declared hostile by the prosecution and with leave of the court they have been subjected to cross-examination by the prosecution.

16. Let it be noted that apart from the seizure witnesses, all other witnesses examined during trial are police personnel. Out of them, P.W.4 Ghulam Mustafa has stated that in the alleged search, cartridges of SLR were recovered; P.W.6 Akhilesh Yadav and P.W.9 Karilal Yadav have stated that large number of cartridges were recovered; P.W.8 Umesh Chandra Singh has stated that about 100 cartridges were recovered; and, P.W.10 Syed Afsar Hashmi has stated that cartridges of SLR and gun were recovered.

17. The other witnesses examined during trial have corroborated the prosecution case as narrated in the FIR.

18. On examination of lower court's record, it would appear that the last witness, that is, P.W.12 Ajay Kumar was discharged on 9.2.2007. Thereafter, on 12.2.2007, the prosecution filed an application before the trial court for bringing on record the report of the forensic science laboratory dated 25.8.2004 and the consent order of the District Magistrate, Darbhanga dated 18.2.2005. The trial court allowed the application filed on behalf of the prosecution and took both the aforementioned documents in evidence and marked them as Ext. 8 and 9 respectively without any formal proof.

19. The forensic report (Ext.8) would make it evident that one medium sized wooden box enclosed within cloth cover containing three packets marked 1 to 3 respectively was deposited by the constable, namely, Ram Bahadur Singh in the office of the Regional Director, Forensic Science Laboratory, Muzaffarpur on 27.5.2004. The description of the articles received, as mentioned in the forensic report, is as follows:

“ 1. The exhibit marked “1” contained a small cardboard box containing one hundred pieces of plain aluminum detonator of size – 1.6” approx. and it was further marked “A” in the laboratory ----- 100 PCS.

2. The exhibit marked “2” contained nine electric

detonator of size – 2.5” crimped with detonating wire of one meter size were wrapped in carbon packet which were further marked ‘B’ in the laboratory -- -- 9 PCS.

3. The exhibit marked ‘3’ contained black fuse wire of sized – 2 meter approx. were wrapped in paper and was further marked ‘C’ in the laboratory.”

20. The result of examination of the articles, as mentioned in the forensic report, is as follows:


“(a) High explosive mixture of “LEAD AZIDE and LEAD STYPHNATE” was detected in contents of card board box marked “A” noted at Sl No.1. Such detonator can explode after passing fire through fuse wire.

(b) High explosive mixture of Lead Azide, Lead Styphnate and P.E.T.N. (Penta Erythritol Tetra Nitrate) was detected in the contents of packet marked ‘B’ described above at Sl. No.2. The crimped wire was for the purpose of passing current for detonating the detonators.

(c) Gun powder mixture was detected in black fuse wire marked ‘C’ noted above at Sl. No.3. The main purpose of this fuse wire is to pass fire to the detonator smokelessly.

It is, therefore, concluded that above described articles marked ‘A’, ‘B’ and ‘C’ were component of high power country-made bomb. These are also used in mines for blasting purpose.”


21. Having considered the oral and documentary evidence led before the court during trial, it is evident that the two independent



witnesses, namely, Parmeshwar Pandit (P.W.2) and Chandeshwar Pandit (P.W.5), in whose presence, as per the case of the prosecution, the house of the appellant was searched have not supported the recovery of explosive substances. The other witnesses, who have stated about recovery of incriminating articles from the house of the appellant, are police officials. Though they were members of the raiding team, but have given contradictory statement to each other in their deposition before the court.

22. As indicated above, the members of the raiding team are not consistent on the point of articles seized during search from the house of the appellant. Some of them have deposed that apart from the articles mentioned in the seizure list more than hundred cartridges were recovered; some others deposed that the recovered cartridges were of SLR; whereas some others deposed that the cartridges so recovered were not only of SLR, but also of DBBL gun. The seizure list does not reflect seizure of even a single cartridge from the house of the appellant. Such being the quality of evidence, it would be highly unsafe to rely on the seizure list prepared by the police.

23. As pointed out earlier, the informant has failed to name the person to whom the custody of seized articles was given after the alleged search and seizure. Though the investigating officer has stated to have received the seized articles, he has failed to name the person




from whom he received the seized articles. The investigating officer has deposed that on receipt he kept the seized articles in *Malkhana* of the police station but no one has come forward to corroborate the fact that the seized articles were ever kept in the *Malkhana*. Neither the *Malkhana* register has been produced in the court nor the *Malkhana* Incharge was examined during trial. The forensic report reflects that the seized articles were delivered in the office by special messenger Ram Bahadur Singh, a constable. The messenger has not been examined during trial. There is no evidence to the effect that when the seized articles were taken out of the *Malkhana* and who kept those articles in wooden box in three different packets. The evidence is confined to the fact that while being sent for test, the articles were sealed by the investigating officer.

24. Further, the articles in question were seized on 9.4.2004 but the forensic report would indicate that the same were sent to Muzaffarpur after a delay of 48 days on 27.5.2004. There is no proper explanation for unreasonable delay caused in sending the articles for examination. Moreover, there is no evidence as to what happened to those articles after they were examined by the forensic expert. They were never produced in the court and the informant of the case has stated that the same cannot be produced as they were neutralized after forensic test. There is no explanation why after being diffused or

neutralized, the articles could not be produced in the court. Admittedly, while being kept in Malkhana, the seized articles were not sealed and according to the investigating officer they were sealed at the time of sending them to the laboratory. The sequence of events narrated above would demonstrate that the prosecution case is full of omissions and commissions.

25. Another aspect of the matter in the present case would be the question of legality of admitting the forensic report and the consent order of the District Magistrate into evidence without any formal proof. Even if it is presumed that the forensic report as contained in Ext.8 would be admissible in evidence under section 293 of the Cr.P.C., the same can be said to be an opinion of the Regional Director of the Forensic Science Laboratory, Muzaffapur of the substances sent to him, but that alone would not be sufficient to prove the fact that the articles mentioned therein were recovered from the house of the appellant.

26. So far as the consent of the District Magistrate as contained in annexure-9 is concerned, the same was admittedly not available on record till the examination of the last witness on 9.2.2007. It is true that the consent report is dated 18.2.2005 but the same was brought on record for the first time on 12.2.2007. I am of the opinion that the consent order could not have been permitted to be



taken in evidence without formal proof. Section 293 of the Cr.P.C. contains special rule of evidence making any document purporting to be a report under the hand of a Government scientific expert upon any matter or anything duly submitted to him for examination and report admissible in evidence without calling such expert as a witness. The consent order of the District Magistrate cannot be equated with report prepared by a Government Scientist.

27. Further, section 7 of the Act of 1908 places a restriction on the trial of any person for an offence under the Act of 1908 without the consent of the Central Government. I am mindful of the fact that the words 'Central Government' in section 7 of the Act of 1908 have been substituted by the 'District Magistrate' with reference to Act 54 of 2001 with effect from 1st February, 2002. Therefore, the District Magistrate is certainly a competent authority for according sanction under section 7 for prosecuting the accused, but the said section mandates that no court shall proceed with the trial of any person for an offence against the Act of 1908 except with the consent of the District Magistrate.

28. It is well known that the trial in a criminal case commences after framing of charge. In the instant case, charges were framed on 28th January, 2005, but the consent of the District Magistrate was brought on record on 12.2.2007. By that time, all the

witnesses for the prosecution had already been examined.

29. In view of the legal position enumerated hereinabove, in my opinion, the trial proceeded without the consent order of the District Magistrate. The irregularity, which occurred in holding the trial, cannot be cured by filing a delayed report without any proper explanation for the delay caused in filing the consent order. Hence, the proceedings in the trial after framing of charges were without jurisdiction and illegal. Even otherwise, the prosecution has failed to prove the charge under section 4 of the Act of 1908 beyond reasonable doubt.

30. In the result, the appeal is allowed and the judgment and order of the court below convicting and sentencing the appellant are hereby set aside. The appellant Uchit Mahto, who is in custody, is directed to be released forthwith, if not required in any other case.

31. Registry is directed to send back the lower court records to the trial court forthwith.

(Ashwani Kumar Singh, J)

Md.S./-

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