
(2012) 05 JH CK 0001

In the Jharkhand High Court

Case No : Criminal Appeal (S.J.) No. 508 of 2011

Ganesh Mahali @ Ganesh Mahli

APPELLANT

Vs

The State of Jharkhand (in all cases)

RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:

Arms Act, 1959 — Section 25(IA), 26, 35
Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 25, 26(1), 35, 399, 402

Citation : (2012) 05 JH CK 0001

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : P.P.N. Roy, Advocates, for the Appellant; Tejo Mistry, Ananda Sen and Shailesh, Advocates For the State : , Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.R. Prasad

1. All five appeals since have arisen out of common judgment were heard together and are being disposed of by the common judgment. All these appeals are directed against the judgment of conviction and order of sentence passed in ST. No. 125 of 2009/ ST. No. 270 of 2009 whereby and whereunder, all the appellants on being found guilty for an offence u/s 399 of Indian Penal Code were sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 2000/- each with default clause. Again, they except appellant-Ravi Shankar Singh were also found guilty for an offence u/s 402 of Indian penal Code and were sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 2000/- each. Yet again appellant-Giri Rao was convicted u/s 25(1-A) and 26 of the Arms Act and was sentenced to undergo RI for seven years and to pay a find of Rs. 5000/- for each of the offences. Rest of the appellants were also found guilty for an offence u/s 25(I-A)/35 of the Arms Act and were sentenced to

undergo RI for seven years and to pay a fine of Rs. 5000/-.

2. The case of the prosecution is that the informant-Rajesh Prakash Sinha (P.W.7), the then Officer In-charge of Olidih Out Post, while was discussing the matter with Umesh Pd. Singh, the then Officer In-charge, Bagbera Police Station, and Krishna Murari (P.W.12), Officer In-charge of Persudih Police Station, in the matter relating to investigation of Mango (Olidih) P.S. Case No. 350 of 2008, a secret information was received that five persons boarded in a Indica Car are proceeding to commit offence of dacoity in the house of some businessman residing within the police station of Sundernagar. Upon it, the informant passed on this information to the Officer In-charge of Sundernagar Out Post. Thereupon, informant-Rajesh Prakash Sinha (P.W.7) and Krishna Murari (P.W.12) went towards Karandih Chowk whereas Officer In-charge of Bagbera Police Station and Officer In-charge of Sundernagar as well as Govindpur Police Station with their team went on different direction and started keeping watch on the person passing through. When the informant went slightly ahead of Karandih Chowk, he saw an Indica Car bearing Registration No. JH05 Q 5128 coming over which 5 to 6 persons were seen sitting. The said car when was intercepted, the persons sitting over there tried to fleeing away from there but they were caught hold of and when personal search was made, appellant-Giri Rao was found in possession of a 7.65 m.m. pistol with six live cartridges which he had kept it in the pocket of his Fullpant. Two mobiles were also recovered from his possession. Further, on search being made, appellant-Ram Ratan Yadav was found in possession of one Bhujali and from possession of appellant- Krishna Pandey one Iron Dab, which has been concealed in his Jacket, was found. Appellant- Tushar Agrawal was found in possession of one mobile. None of the persons could be able to produce any document of it and hence, it were seized in presence of two witnesses under Seizure List (Ext. 1/2) and copy of the Seizure List was given to the accused persons. Seized firearms, cartridges and other weapons were sealed.

3. Further case of the prosecution is that on being interrogated, the accused persons disclosed that appellant-Tushar Agrawal was in need of money and hence they were going to commit dacoity in the house of uncle of Tushar Agrawal and that firearm had been given by appellant- Ganesh Mahali @ Ganesh Mahli to appellant-Giri Rao and the entire plan had been hatched up by appellant- Ravi Shankar Singh. In the said plan, one Md. Athar Iqbal was also supposed to join but he could not join them. All the accused persons were arrested and the arrest memo was prepared. The informant-P.W. 7 lodged a written report to the aforesaid effect at Sundernagar Police Station, upon which a case was registered under Sections 399 and 402 of Indian Penal Code and under Sections 25(I-A)/26/35 of the Arms Act against the appellants.

4. The matter was taken up for investigation by the Investigating Officer-Jay Govind Nath Munda (P.W. 13) who inspected the place of occurrence and also recorded the statement of the witnesses and got the firearms and ammunitions examined by Sergeant Major Rajendra Prasad Pandey-P.W. 11 who on examining

submitted his report (Ext. 10).

5. On completion of the investigation, the police submitted charge-sheet upon which cognizance of the offence was taken and in due course, when the case was committed to the court of Sessions, charge was framed to which the appellants pleaded not guilty and claimed to be tried.

6. In course of trial, the prosecution, in order to prove the charges against the appellants, examined thirteen witnesses. Of them, P.W. 1-Krishna Pusti and P.W. 2-Jayant Pusti, seizure witnesses, are turned hostile, whereas P.W. 3-Ganesh Baitha, P.W. 4-Badan Prasad, P.W. 5-Bhushan Chandra Malua, P.W.6-Kauslendra Kumar Sharma, P.W. 8-Pappu Kumar Singh, P.W. 9-Vinod Kumar Tiwari, all members of the raiding party including P.W. 7-informant, supported the case of the prosecution that the appellants, who were going in an Indica Car, when were apprehended, personal search was made whereby appellant-Giri Rao was found in possession of arms and ammunitions whereas others were found in possession of Bhujali, Iron Dab and mobiles which were produced in the court during course of trial and that they were to commit dacoity in the house of uncle of co-accused Tushar Agrawal.

7. Prosecution case on being closed, defence examined one D.W. 1, Arun Agrawal, uncle of Tushar Agrawal who stated that appellant- Tushar Agrawal is the Director of Tushar Enterprises Pvt. Ltd. and he does have also a firm in his name and that financial condition of Tushar Agrawal is quite good and he does file income tax return every year.

8. The trial court on such evidence did find all the accused persons guilty for an offence u/s 399 of Indian Penal Code. Further, the trial court did find all the appellants except appellant-Ravi Shankar Singh guilty for an offence u/s 402 of Indian Penal Code. That apart, the trial court did find all the accused persons except appellant-Giri Rao guilty for an offence u/s 25(I-A)/35 of the Arms Act whereas he did find appellant-Giri Rao guilty for an offence u/s 25(I-A)/26 of the Arms Act and hence recorded the order of conviction and sentence, as aforesaid.

9. Being aggrieved with the said judgment, these appeals have been preferred.

10. Mr. P.P.N. Roy, learned senior counsel appearing for the appellants-Ganesh Mahali @ Ganesh Mahli and Giri Rao, submits that admittedly appellant-Ganesh Mahali was never present in the vehicle but he was made accused as according to the case of the prosecution, the co-accused disclosed that appellants-Ganesh Mahali @ Ganesh Mahli was the person who had given firearms and ammunitions to appellant-Giri Rao and only on the basis of the disclosure made by co-accused, which does not have any evidentiary value, the trial court recorded the order of conviction which is quite illegal.

11. It was further submitted that so far appellant-Giri Rao is concerned, he is said to have been found in possession of 7.65 m.m. pistol loaded with six live cartridges but this fact has never been supported by the seizure witnesses-P.W. 1

and 2 though the factum of recovery has been supported by the members of the raiding party but keeping in view the fact that they all being interested in getting the appellants convicted, the trial court should not have relied upon the testimonies on those witnesses.

12. It was also submitted that so far conviction under Sections 399 and 402 of Indian Penal Code is concerned, it is quite bad for the reason that the prosecution has failed to establish that appellant-Giri Rao along with other co-convicts having assembled were making preparation for committing offence of dacoity.

13. Mr. Sen, learned counsel for the appellants- Tushar Agrawal, Krishna Pandey and Chhotu Thakur @ Chhotu Kumar Thakur, submits that admittedly none of these appellants has been found in possession of the firearms still they have been convicted u/s 25(1-A) with the aid of Section 35 of the Arms Act but the prosecution has failed to establish that these appellants had had knowledge that appellant-Giri Rao was having firearms with him and thereby the conviction of these appellants under the Arms Act is quite bad.

14. It was further submitted that it is the case of the prosecution that the accused persons were going in an Indica Car to commit dacoity in the house of the uncle of appellant-Tushar Agrawal, as appellant-Tushar Agrawal was in need of money which the informant claimed to have come to know from the mouth of the accused persons but the case of the prosecution gets demolished from the evidence of the uncle of Tushar Agrawal who has been examined as D.W. 1 wherein he has stated that Tushar Agrawal is the Director of one of the Companies. Besides that he is the owner of the other company and is an income tax payee and thereby he deserves to be acquitted.

15. Almost similar is the submission advanced on behalf of appellant-Ram Ratan Yadav. So far appellant- Ravi Shankar Singh is concerned, it is submitted by learned counsel that he was never found traveling in a car along with the other accused persons and, therefore, he was never apprehended by the police at the spot still appellant- Ravi Shankar Singh has been found guilty for an offence u/s 399 of Indian Penal Code on the basis of confessional statement made by the accused disclosing therein that it was this appellant who had hatched plan for committing dacoity which will have no evidentiary value and as such this appellant has been convicted without there being any evidence whatsoever.

16. Having heard learned counsel appearing for the parties, it does appear that it is the case of the prosecution that when a secret information was received by the informant-P.W. 7 that certain persons are proceeding towards Sundernagar in an Indica Car for committing dacoity, said car was intercepted on which appellants- Giri Rao, Krishna Pandey, Ram Ratan Yadav and Tushar Agrawal were found sitting over it which was being driven by Chhotu Thakur. On search being made, Giri Rao was found in possession of the firearms along with ammunition whereas appellant-Krishna Pandey was found in possession of one Iron Dab whereas

appellant-Ram Ratan Yadav was found in possession of Bhujali. Appellant-Tushar Agrawal was found in possession of one mobile.

17. In course of trial, the prosecution has been able to establish by adducing P.W. 3, P.W.5, P.W. 6, P.W. 7, P.W. 8, and P.W. 9, who were the members of the raiding party. Seizure witnesses though have not supported the factum of seizure of firearms and ammunitions from the possession of appellant-Giri Rao and other materials from the possession of other persons but it hardly affects the case of the prosecution as the other prosecution witnesses can be said to have established this fact as nothing adverse could be elicited in this respect from them. In spite of the aforesaid fact being proved, the question does arise as to whether the prosecution has been able to establish the charge under Sections 399 and 402 of Indian Penal Code?

18. The preparation for committing dacoity is the main ingredient of the aforesaid Offence. The prosecution has come forward with the case that the appellants were going in a vehicle to commit dacoity in the house of the uncle of Tushar Agrawal (one of the appellants) as Tushar Agrawal was in need of money but this theory gets demolished from the evidence of D.W. 1, uncle of Tushar Agrawal who has stated that Tushar Agrawal is a director of a Company and besides that he has own company and he is an income tax payee. Under the situation, even if some of the appellants have been found in possession of the firearms and other weapons, it can under the aforesaid circumstances never be said that they had assembled in a car for making preparation to commit dacoity.

19. Further, it be recorded that appellant- Ganesh Mahali @ Ganesh Mahii and Ravi Shankar Singh were never found in the said car in the company of the other appellants still they have been convicted u/s 399 of Indian Penal Code on the basis of the confession made by co-accused that it was Ganesh Mahali who had supplied the firearms to Giri Rao and Ravi Shankar Singh was the master mind and only on the basis of the confession made by co-accused, those two persons not only were made accused but they were also found guilty for an offence u/s 399 of Indian Penal Code though no evidence is there that they had assembled for making preparation to commit dacoity. Thus, the judgment of conviction recorded u/s 399 of Indian Penal Code against all the appellants as also u/s 402 of Indian Penal Code recorded against appellants-Tushar Agrawal, Giri Rao, Chhotu Thakur @ Chhotu Kumar Thakur, Krishna Pandey and Ram Ratan Yadav is hereby set aside and they are acquitted of the charges.

20. Going further in the matter, it be stated that appellants-Tushar Agrawal, Chhotu Thakur @ Chhotu Kumar Thakur, Krishna Pandey and Ram Ratan Yadav though have not been found in possession of the firearms, still they have been convicted under Sections 25(1-A) with the aid of Section 35 of Arms Act. At this stage, one needs to take notice of Section 35 of the Arms Act which reads as follows:-

35; Criminal responsibility of persons in occupation of premises in certain cases.--

Where any arms or ammunition in respect of which -any offence under this Act has been or is being committed are or is found in any premises, vehicle or other place in the joint occupation or under the joint control of several persons, each of such persons in respect of whom there is reason to believe that he was aware of the existence of the arms or ammunition in the premises, vehicle or other place shall, unless the contrary is proved, be liable for that offence in the same manner as it if has been or is being committed by him alone.

21. From the aforesaid provision it does appear that the accused even if is not found in exclusive possession of the firearms, still he can be convicted u/s 25 of the Arms Act if he does have knowledge of the existence of firearm but in order to secure conviction, the prosecution needs to lead satisfactory evidence to show that the accused had knowledge of the existence of firearm which was in exclusive possession of the others.

22. Here in the instant case, the prosecution has not led any evidence whatsoever that appellants-Tushar Agrawal, Chhotu Thakur @ Chhotu Kumar Thakur, Krishna Pandey and Ram Ratan Yadav were having knowledge of the firearms being in possession of Giri Rao. Under the circumstances, conviction of appellants under the Arms Act is certainly bad and accordingly, they are acquitted of the charges under Sections 25(I-A)/35 of the Arms Act.

23. Further, it does appear that appellant-Giri Rao has been found in possession of the firearm along with cartridges but the factum of recovery of the firearm and cartridges has not been supported by the independent seizure list witnesses-P.W. 1 and P.W. 2 rather other witnesses, who were the member of raiding party, have supported the factum of recovery. In absence of any material showing bias prejudice or enmity or any cogent material, testimonies cannot be discarded simply for the reason that they were the members of raiding party. Further, I do find that the witnesses have also deposed that the firearm and cartridges having been recovered were sealed and were sent to Sergeant Major Rajendra Prasad Pandey-P.W. 11 who having found the same to be effective one, submitted his report (Ext.10) and thereby the trial court has rightly convicted appellant-Giri Rao for an offence u/s 25(1-A) of the Arms Act. That apart, appellant-Giri Rao has also been convicted for an offence u/s 26 of the Arms Act but in my view, the prosecution has failed to establish the accusation u/s 26 of the Arms Act.

24. It be stated that since" the firearm loaded with cartridges was recovered from the pocket of Full pant of appellant-Giri Rao, charge was framed u/s 26 of the Arms Act but there has been absolutely no evidence that appellant-Girl Rao has concealed the same with the intention that it may not be known to the public servant. Mere possession of firearm is not enough to make out an offence u/s 26(1) of the Arms Act but the possession of firearm must be in such a manner which would indicate the intention of the person to conceal the same so that the public servant may not know about the concealment of the firearm.

25. From the evidence adduced, it is not discernible that the appellant-Giri Rao

was aware of the fact that a raid was to be conducted by the police and thereby in order to conceal the firearm from the raiding party, appellant-Giri Rao concealed the firearm. In absence of such evidence, conviction u/s 26 of the Arms Act is not justified and is liable to set aside.

26. Accordingly, appellant-Giri Rao is acquitted of the charge u/s 26 of the Arms Act.

27. Now coming to the point of sentence, it does appear that appellant-Giri Rao has been sentenced to undergo Rigorous imprisonment for seven years with a fine of Rs. 5000/- for each of the offences which in the facts and circumstances of the case appears to be somewhat excessive.

28. Hence, the order of sentence is modified to the extent that instead of rigorous imprisonment of seven years, appellant-Giri Rao is sentenced to undergo rigorous imprisonment for three years and the fine, imposed by the trial court, would remain intact. The period undergone in custody during trial shall be set off in terms of Section 428 Cr. P.C. Accordingly, Cr. Appeal (S.J.) No. 556 of 2011 is dismissed with modification in order to conviction of sentence as aforesaid, whereas rest of Cr. Appeals are hereby allowed.