

(2019) 12 PAT CK 0022

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 4809 Of 2018

Lakhan Yadav @ Lakhan Das And Anr

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Arms Rules, 1962 — Rule 3

Arms Act, 1959 — Section 2, 2(E), 3, 7, 25(1)(A), 25(1)(B), 26, 26(2), 39

Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 12 PAT CK 0022

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Pankaj Kumar Sinha, Binod Bihari Singh

Final Decision : Partly Allowed

Judgement

1. At the time of prayer for bail, it has been submitted at the end of learned counsel for the appellants that against the sentence having been inflicted to the appellants to the tune of RI for five years, appellants are under custody since 17.04.2015 and on account thereof, more than four years have elapsed whereupon, it has been thought prudent to hear the appeal on its merit than to croon over ancillary event.

2. Appellants, Lakhan Yadav @ Lakhan Das and Sunita Marandi have been found guilty for an offence punishable under Section 25(1-A), 26(2) of the Arms Act and each one has been directed to undergo RI for five years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo SI for six months, additionally, under both counts, independently, with a further direction to run the sentences concurrently vide judgment of conviction dated 26.11.2018 and order of sentence dated 28.11.2018 passed by the Sessions Judge, Jamui in UAP Case No. 59/2015 arising out of Chandradip PS Case No. 28/2015.

3. Jyoti Kumar (PW 2), Officer Incharge of Chandradeep PS recorded his own Fardbeyan on 16.04.2015 at about 2:20 AM at the hilly area of Bhaluna Jangal

disclosing therein that as per direction given by Superintendent of Police, Jamui to intercept the members of the Naxal outfit whose movements have been reported at the southern extremity of Bhaluna Jagal, a raiding party was constituted and proceeded on 16.04.2015 at about 2:20 PM and, intermingled with the other arms personnel who were present since before and engaged in cordoning the area (detailed names of SSB Constables, CRPF Constable, STR, QRF). After arrival of police high-ups, the team was bifurcated in two parts, one under the leadership of S.P. Jamui and another under the leadership of ASP, operation Jamui. When they intruded inside the jungle, some activities have been perceived whereupon, the persons were directed to stop but, they have escaped towards dense forest area who were chased and during course thereof, one lady as well as one male along with weapons possessed by them, were apprehended, who were taken into custody, interrogated and during course thereof, the male member disclosed his name as Lakhan Yadav son of Shankar Yadav resident of village Chilkakhar, while female disclosed her name as Sunita Marandi daughter Munna Marandi, resident of village Asarakho, P.S. Sono. Then thereafter, each one was searched out and during course thereof, from the possession of Lakhan Yadav, one Insas Rifle bearing Arsenal No. 16837839, on removal of magazine, 16 rounds of live cartridges were found loaded, two separate magazines each containing 20 rounds of loaded live cartridges, 5.56 MM live cartridges (74 pieces), one mobile, one walky-talky, two hand grenades while from the possession of Sunita Marandi, one 9 MM machine carbine bearing Arsenal No. 16204338 and on removal of magazine 25 rounds of live cartridges, two magazines having 26 rounds in each, all live, one pouch having 45 live cartridges of 9 MM. One mobile, one pitthu anklet, one pair, whistle dor, one pair, dress two pairs were seized and for that, seizure list was prepared in presence of Dinesh Rawat and Brahamdeo Yadav.

4. On query, they failed to furnish any document relating thereto. They have also disclosed that both are husband and wife and are engaged in propagating their principle as well as persuades the people to join the institution. Then thereafter, on pointing out of Lakhan Yadav and Sunita Marandi, they have searched a place wherefrom cylinder of 5 Kilograms, six pieces sockets for the preparation of bomb 30 pieces, steel tiffins, 6 pieces balance, one piece, wire 100 metres were seized and for that another seizure list was prepared.

5. On the basis of aforesaid self statement of the Officer Incharge, Chandradip PS Case No. 28/2015 was registered followed with investigation as well as submission of charge-sheet keeping investigation pending against others facilitating the trial meeting with the ultimate result, subject matter of the instant appeal.

6. Defence case as is evident from the mode of cross-examination as well as statement under Section 313 CrPC is that of complete denial. However, nothing has been adduced in defence.

7. In order to substantiate its case, prosecution has examined altogether 15 PWs

who are PW-1, D.N. Pandey, PW-2, Jyoti Kumar, PW-3, Awadhesh Kumar, PW-4, Sonu Kumar, PW-5, Shyam Sundar Pd. Kashyap, PW-6, Hawildar Purushottam Singh, PW-7, Hari Darshan Singh, PW-8, Constable Munilal Sharma, PW-9, Dy. SP., Surendra Kumar Singh, PW-10, Md. Anis Khan, PW-11, Krishan Kumar, PW-12, Jayant Kant, the then SP, Jamui, PW-13, Sunil Kumar Singh, PW-14, Rajendra Prasad, PW-15, Dineshwar Mandal. Side by side has also exhibited Ext-1, Written report by PW-2, Ext-2, 2/1, two seizure list one of Bhaluna, another of Gidheshwar Pahari, Ext-3, Arms & Ammunition examination report of Sergeant Major, Ext-4, Order for obtaining sanction for prosecution from District Magistrate. The prosecution has also exhibited the articles as Material Exhibits, i.e., Material Ext-1, Insas Rifle, Material Ext-1/1, Carbine, Material Ext-1/2 to Material Ext-1/7, six small gas cylinder, Material Ext-2, to 2/29-30 shockets, Material Ext-3 weighing tool (Tarazoo), Material Ext-4 to 4/2, three pieces of loaded magazines of Insas rifle, Material Ext-5 to 5/2, three carbine Magazines recovered from Sunita Marandi, Material Ext-6, Samsung Mobile, Material Ext-6/1, Mobile of Richtek company, Material Ext-7, one walky-talky, Material Ext-8, whistle recovered from Sunita Marandi, Material Ext-9 to 9/11, two inclate stove of Sunita Marandi, Material Ext-10 to 10/1, two pouches of both accused persons, Material Ext-11, one pithu from Sunita Marandi, Material Ext-12, to 12/1, two sets of uniform, Material Ext-13, 100 metres wire, Material Ext-14 to 14/21, 122 pieces of 9 M.M. cartridges, Material Ext-15 to 15/129, 130 pieces of Insas cartridges, Material Ext-16, six empty tiffin boxes.

8. As stated above, nothing has been adduced in defence.

9. Two fold arguments have been made on behalf of learned counsel for the appellants. The first and foremost is that from the judgment impugned, it is evident that lady convict, Sunita Marandi has begotten a male child in the jail itself and that is indicative of the fact that at the time of apprehension, she was pregnant. In the aforesaid background, it has been submitted that actually Maoists had escaped leaving behind their weapons, unfortunately, both these convicts who are residents of adjacent forest, had gone to bring fire-wood as well as to avail other natural resources and during midst thereof, they have been apprehended, otherwise being pregnant, could it be imaginable presence of lady accused in a manner, as alleged at the place and so, submitted that being absence of criminal antecedent and further, having failure on the part of the prosecution to trace out any other Maoist/Naxali save and except these two appellants, even in worst case, considering the period of custody in consonance with the sentence so inflicted which, if calculated as per jail calendar having no adverse entry would saturate the period of sentence and so, the appellants be let off as period having undergone.

10. In an alternative, it has been submitted that there happens to be no independent witness to support the factum of search and seizure and further, there happens to be no positive evidence that the arms and ammunition were sealed at the spot in order to shut any prospect of false implication, whereupon,

conviction and sentence recorded by the learned lower court could not be concurred, more particularly, as per the principle laid down by the Hon'ble Apex Court in the case of Jasbir Singh v. State of Punjab as reported in AIR 1998 SC 1660. Accordingly, the judgment impugned is fit to be set aside.

11. The learned Additional P.P. while controverting the submission has stated that from the evidence of the PW-8, it is apparent that there happens to be consistency over apprehension of both the appellants having in possession of prohibited arms and ammunition. That being so, the finding recorded by the learned lower court is fit to be concurred.

12. Appellants have faced trial for an offence punishable under Section 25(1-B), 25 (1-A), 26, 26(2) of the Arms Act, 4, 5 of the Explosive Substance Act and, 16-17,18 and 20 of UAP Act. Furthermore, it is also apparent that learned lower court had acquitted the appellants with regard to remaining offence save and except Section 25(1-A), 26(2) of the Arms Act. From the judgment impugned, it is evident that acquittal of under UAP Act happens to be on account of incompetency of the I.O. to investigate the case as well as absence of sanction either at the end of the Central Government or at the end of State Government and so far Explosive Substance is concerned, neither any material exhibit has been nor the ballistic expert had reported thereto. That part being unchallenged, met with finality (acquittal).

13. Now coming to the propriety of the judgment impugned with regard to 25(1-A), 26(2) of the Arms Act is concerned, from the evidence available on the record, it is evident that none had deposed that after seeing them (public servant) any of the appellants had tried to conceal the weapons as well as ammunition and that being so, Section 26(2) of the Arms Act would not be applicable whereupon, conviction and sentence relating thereto, is not found justified and is accordingly rescinded.

14. Now with regard to recovery of arms ammunition is concerned, whether the same happens to be prohibited arms, prohibited ammunition. For that, first of all, the definition clause, is to be considered. For better appreciation, the same is quoted below:-

2. (h) "Prohibited ammunition" means any ammunition, containing, or designed or adapted to contain, any noxious liquid, gas or other such thing, and includes rockets, bombs, grenades, shells, [missiles] articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition;

(i) "prohibited arms" means--

(I) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty, or

(ii) weapons of any description designed or adapted for the discharge of any

noxious liquid, gas or other such thing, and includes artillery, anti-aircraft and anti- tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms:

15. The same is further found duly classified under Rule-3 of the Arms Rule and Schedule-1 thereof, duly details the nature of the weapon.

16. Section 7 of the Arms Act prohibits possession of prohibited arms and ammunition and possession thereof, is punishable under Section 25(1-A) of the Arms Act. However, other provisions are also there to tackle other kind of violation of the provision of the Arms Act. Furthermore, as per Section 39 of the Act, it is manifest that sanction is necessary only with regard to violation of Section 3 of the Arms Act, that means to say, possession of ordinary fire arm without license. The ordinary fire arm is defined under Section 2(E) and so, after having parallel scrutiny of Section 2, Section 3, Section 39, it has become abundantly clear that for the possession of prohibited arms and ammunition, no sanction is required for its prosecution.

17. At the present moment, it looks appropriate to refer the evidence of PW-5, Sergeant Major who had examined the arms and ammunition having been produced before him. He, during his examination-in-chief has stated that on 08.07.2015, he was posted as Sergeant Major at police line, Lakhisarai. On that day, the arms and ammunition relating to Chandradip PS Case No. 28/2015 was produced by the I.O. in pursuance of order passed by Sessions Judge, Jamui. There was one Insas rifle and one carbine, in sealed condition, in a cloth bag. There was a large number of cartridges and after opening the same, he had found 130 rounds of 5.50 MM and 122 rounds of 11 MM, .38 Bore, magazine and have inspected the same, found the same to be effective one and submitted report thereto. Exhibited the same. From his evidence, it is further evident that he had mentioned number of Insas rifle and in likewise manner, that of carbine. Also submitted that those arms were semi- automatic and were prohibited. It is further deposed that aforesaid arms were being supplied by the Government to its army personnel. It is further disclosed that all the cartridges and magazines were sealed in a cloth bag, however, Insas rifle as well as carbine were left open. Exhibited his report. During cross-examination at para-13, he has stated that both the weapons, that means to say, Insas rifle as well as carbine were brought before him in open condition. There was no specific mark. At para-14, he has stated that so far cartridges and magazines are concerned, they were brought in a cloth bag having duly sealed. Then there happens to be denial at his end that coming under hands of S.P., Jamui, collusive report has been submitted.

18. PW-2 is the informant. During his examination-in-chief, he has stated that on 16.04.2015, he was Officer Incharge of Chandradip Police Station. On that day at about 4:00 AM., he was directed by the Superintendent of Police, Jamui to proceed along with armed police constable towards Bhaluna whereas he got confidential information with regard to assemblage of Naxalites. It has also been disclosed that since 15.04.2015, operation was going on. Accordingly, he

proceeded along with police personnel and after reaching at the concerned village, they have found CRPF, SSB, District Armed Force, ASP operation since before. Till then, S.P., Jamui also arrived and then police personnel were bifurcated in two groups, one under the leadership of ASP and another under SP, Jamui. During course of search, the Naxalites began to flee and during course thereof, they succeeded in apprehending two persons, including one lady. On query, she disclosed herself as Sunita Marandi and the male as Lakhan Yadav @ Lakhan Das. During course of search, from the possession of Lakhan Yadav, one Insas rifle, two magazines, two grenades, 74 pieces live cartridges were recovered while from the possession of Sunita Marandi, 9 M.M. Carbine, two loaded magazines and large number of 9 M.M. live cartridges including other articles were recovered. As none was present, on account thereof, seizure list was prepared in presence of two armed constables who have been stamped as seizure list witness. They have further confessed to be members of Naxal outfit. They have also disclosed that so many incriminating articles are also concealed at Gidheshwar Pahari wherefrom, gas cylinder, sockets, oil, tiffin etc., were seized and for that, seizure list was also prepared. Identified the accused. Then he recorded his self statement, (exhibited all the relevant documents). Then produced Insas Rifles, cartridges, 9 MM Carbine, Gas Cylinder, other items. During cross-examination, her attention has been drawn up with regard to mandatory provisions of UAP Act whereunder Dy.SP should be the Investigating Officer. It has further been disclosed by him that he has got knowledge with regard to relevant provision of UAP Act. He has further stated that he has not mentioned mark of each and every cartridge. He has further stated that he had not affixed specific mark over the seized arms and ammunition. He has further stated that after coming to police station he had sealed the arms and ammunition. He had not sealed at the place of occurrence. He is unable to say as to who apprehended the accused. He has further stated that he is not remembering the name of concerned police official who had produced the arms and ammunition before him. He has further stated that all the arms and ammunition were kept in Maalkhana. From his evidence, it is apparent that recovery is not under challenge. Furthermore, it is also evident that the weapons as well as cartridges are prohibited arms and ammunition and were effective one. Apprehension of appellants are also not denied. More or less, that happens to be the evidence of remaining witnesses who were part and parcel of the raiding party and from their evidences also, it is crystal clear that they are consistent over arrest and recovery of the prohibited arms and ammunition from the possession of the appellants. However, there happens to be some sort of deficiency at the end of PW-14, Rajendra Prasad who claimed to have identified the female accused, Sunita Marandi but not male accused, Lakhan Yadav.

19. It is evident that PW-15, Dineshwar Mandal happens to be formal in nature as, he has simply exhibited the sanction, which is not at all found necessary in the present context as the sanction in terms of Section 39 is only required for prosecution relating to violation of Section 3 of the Arms Act while, possession of

prohibited arms is in contravention of Section 7 of the Act. The ruling so referred by the learned counsel for the appellants has got no applicability as right from seizure list there happens to be specific disclosure of arsenal number which is the material exhibits, whereupon, could not be challenged being a case of transplantation.

20. Giving anxious consideration to the facts and circumstances of the case, it is apparent that learned lower court had taken every precaution while filtering the materials available on the record, more particularly, while analyzing the evidences to the extent of applicability of Section 25 (1-A) of the Arms Act is concerned. That being so, retaining the finding and sentence so inflicted for an offence under Section 25(1-A) of the Arms Act, conviction and sentence relating to Section 26(2) of the Arms Act as recorded hereinabove, stood set aside. Hence appeal is partly allowed.

21. Appellants are under custody which they will remain till the saturation of their period of sentence.