
(2002) 05 PAT CK 0066

In the Patna High Court

Case No : Criminal Appeal No's. 158 and 190 of 1996 (DB)

Md. Ashad and Others

APPELLANT

Vs

State of Bihar
 Md. Haider Ali Vs The State of Bihar

RESPONDENT

Date of Decision : 07-05-2002

Acts Referred:

Constitution of India, 1950 — Article 258
Explosive Substances Act, 1908 — Section 3, 4, 7
Penal Code, 1860 (IPC) — Section 148

Citation : (2002) 2 BLJR 1493 : (2002) 3 PLJR 366

Hon'ble Judges : Tarkeshwar Prasad Singh, J; Sachchidanand Jha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.J. Mukhopadhyaya, J.—These two appeals on behalf of twelve appellants in all are directed against judgment and order of conviction. The appellants of Criminal Appeal No. 158/ 96 have been convicted under Sections 3 and 4 of the Explosive Substances Act, 1908 and sentenced to rigorous imprisonment for ten years each under both. They have also been convicted u/s 148 of the Penal Code and sentenced to rigorous imprisonment for two years. The sole appellant of Criminal Appeal No. 190/96 too has been convicted under Sections 3 and 4 of the Explosive Substances Act but sentenced to rigorous imprisonment for life u/s 3 of the Act and rigorous imprisonment for 15 years u/s 4. He too has been convicted u/s 148 of the Penal Code and sentenced to rigorous imprisonment for two years. It may be stated here that 15 persons including 12 appellants herein were put on trial. The trial of three of them, namely, Md. Samiullah, Md. Mursalim and Md. Nasim was separated later for being tried by the Juvenile Court i.e. the Chief Judicial Magistrate.

2. The prosecution was set in motion on the self-statement of Indradeo Singh, A.S.I, of Police, Nathnagar P.S. to the effect that on 15.11.1989 at 12.30 p.m. he heard the sound of explosion of bombs and fire-arms and also received

information that the, officer Incharge of the Police Station, Shri A. Prasad, was surrounded by a mob. He along with police force proceeded towards Bishari Asthan. When he reached near the house of Md. Haider Ali in Abir Mishra lane at Champanagar, he again heard the sound of explosion and firing. The police party surrounded the entire locality. In the meantime, a platoon of Central Reserve Police Force also reached there. With their help the search commenced. In presence of witnesses, namely, Gopal Prasad Singh and Vishwanth Prasad Sah, examined as P.Ws. 6 and 5, he arrested said Md. Haider Ali carrying a bag containing 10 bombs. Md. Samiullah @ Munna was also arrested along with loaded country pistol and live cartridges. Likewise, Md. Mursalin and Md. Nasim and others were also arrested with country made pistols and bombs. The informant alleged that the above said persons were making attempt to hurl bombs. But, on the threat by the police party they surrendered their bombs which were put in a bucket full of water. Seizure list was thereafter prepared. The informant alleged that communal riot was going on in the area and the accused persons were intending to commit riot.

3. On the basis of the above statement, a formal FIR was drawn up. The informant himself took up the investigation, at the end of which he submitted charge-sheet against the abovementioned 15 persons after obtaining sanction for their prosecution under the Explosive Substances Act from the District Magistrate.

4. At the trial which followed, the prosecution examined 11 witnesses to prove its case. The array of witnesses includes besides the informant who was examined as P.W. 9 and above said Gopal Prasad Singh and Bishwanath Prasad who were examined as P.Ws. 5 and 6, Rameshwary Mandal as P.W. 1, Bishundeo Prasad Bimal as P.W. 2, Ram Chandra Mehta as P.W. 3, Ram Nath Singh as P.W. 4, Narender Mishra as P.W. 7, Hasanuddin Khan as P.W. 8, Raj Kishore Singh as P.W.

10 and Achyuta Prasad as P.W. 11. Among these witnesses, P.W. 8 was examined as a formal witness to prove sanction, while P.W. 11 was tendered.

5. It may be stated here that besides P.Ws. 5 and 6, who were examined as public witnesses on the point of seizure, all other witnesses are police personnel who claimed to be the members of the Force which made arrest and in whose presence the articles were seized. Curiously, except the informant, and P.Ws. 3 and 4 who identified only Daud, none of the accused present in the dock was identified by the witnesses. This naturally provided a ground to the Counsel for the appellants to contend that in the absence of the identification the appellants could not be held guilty. We, however, do not find any substance in the contention for the reason that all the appellants were arrested on 15.11.1989 from the place of occurrence itself and all along remained in custody. The question of their identification, therefore, is of not much relevance. It may be mentioned that the arrest of the appellants from the place of occurrence and their continued incarceration in custody until their production in Court is not in dispute. The fact that some of the members of the police party could not identify them in dock in course of trial held after sometime cannot be a ground to

disbelieve the prosecution case.

6. It was next submitted on behalf of the appellants that the very trial under the Explosive Substances Act was vitiated on the ground of absence of sanction of the Central Government in terms of Section 7 of the Act. Section 7 of the Explosive Substances Act puts restriction on trial of offence except with the consent of the Central Government. (The Section has been amended in 2001 vide Act 54/2001. As per the amended section, District Magistrate is now vested with the power to accord his consent or sanction). It was contended that in the instant case the appellants were put on trial on the basis of sanction of the District Magistrate, Bhagaipur in purported exercise of delegated power but as the Act does not provide for any delegation, the Central Government could not have delegated its power u/s 7 of the Act to the District Magistrate and, therefore, the District Magistrate was not competent to accord sanction. Reliance was placed on two decisions of this Court in *Dhrub Kumar v. The State of Bihar* 1988 PLJR 621 and *Dilip Mandal Vs. The State of Bihar*, . We do not find any substance in this contention either.

7. Article 258(1) of the Constitution provides that notwithstanding anything in the Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends. In exercise of the said power a notification was issued in the name of the President of India on 4.5.1957 vide Notification No. 33/2/57 Police (IV) of the Ministry of Home Affairs to the following effect:

In exercise of the powers conferred by Clause (1) of Article 258 of the Constitution and in supersession of all previous notifications on the subject the President hereby entrusts to all State Governments, with their consent, the functions of the Central Government u/s 7 of the Explosive Substances Act, 1908 (VI of 1908).

"Explosive" being an item falling List I of the Union List of the Seventh Schedule of the Constitution, the power of the Parliament to make laws with respect to exercise of executive power cannot be doubted. A conjoint reading of Article 258(1) of the Constitution and the notification dated 4.5.1957 leaves no room for doubt that the function exercisable by the Central Government u/s 7 of the Explosive Substances Act could be delegated by the President in exercise of the executive power to the State Government or its officers. It is relevant to mention here that while earlier the delegation was made in favour of the State Governments on 4.5.1957, later similar delegation was made in favour of the District Magistrate on 2.12.1978 vide Notification No. S.O. 3583 of the Ministry of Home Affairs, Government of India in the same terms as notification dated 4.5.1957 quoted above. It would thus follow that the District Magistrate was fully competent in exercise of his delegated power to accord consent or sanction u/s 7 of the Act for prosecution of the appellants under the Explosive Substances Act.

8. In the above premises, the decisions relied on by the Counsel in the cases of Dhrub Kumar (supra) and Dilip Mandal (supra) cannot be said to be correct. It appears from perusal of the judgments that attention of the Court was not drawn to the above notifications nor to the provisions of Article 258(1) of the Constitution. Having been rendered sub silentio they cannot be said to have laid down a correct law and deserve to be overruled.

9. Counsel submitted, while dealing with the validity of the sanction order, that in any view of the matter the names of all accused were not mentioned in the sanction order, and therefore, those whose frames do not find mention could not be prosecuted under the Explosive Substances Act. This submission too does not have any substance. It is true that the names of all 15 accused (originally put on trial) were not mentioned in the body of the sanction order, but the fact that the sanction order refers to Md. Haider Ali and other accused "as per FIR" makes it clear that the sanction was being accorded with respect to all 15 accused whose names find place in the FIR and, therefore, we do not find any defect in the FIR and, therefore, we do not find any defect in the sanction order on this score. Counsel also made a passing submission to the effect that sanction was accorded without proper application of mind. However, nothing further was added to substantiate the submission. Having perused the sanction order we do not think that there was no proper application of mind.

10. Counsel then submitted that the appellant could not be convicted u/s 3 of the Explosive Substances Act, inasmuch as there is no allegation of any explosive of bomb or any other explosive substance at the hands of the appellants. The allegation only is that they were making preparation to explode the bombs. This submission of the Counsel, in our opinion, appears to be well founded. Section 3 of the Act provides for punishment to any person who "unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property...." From bare perusal of the section it is evident that in order to constitute the offence u/s 3 there must be an explosion which should be of nature likely to endanger life or to cause serious injury to property etc. Inasmuch as there is no allegation of any explosion at the hands of the appellants, clearly, they could not be convicted u/s 3 of the Act. Their conviction under that section, therefore, cannot be sustained.

11. Counsel submitted that the appellants cannot also be convicted u/s 4 of the Explosive Substances Act because there is no legal evidence to show that the articles which were allegedly recovered from the appellants were "explosive substances". He pointed out that as per the prosecution case itself no sooner than the so-called bombs were seized from the appellants, they were put in a bucketful of water. Counsel for the State submitted that bombs were neutralised by putting them in water out of fears and thereafter there was no question of their examination by any forensic expert about their being explosive substance or not. It is difficult to accept the submission of the Counsel for the State. If the articles which were allegedly seized from the appellants were kept in bucketful of

water it was a lapse on the part of the police, the benefit of doubt arising from which must go to the accused. It is not possible to accept the submission without any expert evidence on the point that after being kept in water the articles were not fit for any kind of forensic examination by expert. Section 4 of the Act provides for punishment for attempt to cause explosion or for making or keeping explosive substance with intention to endanger life or property. Whether under Clause (a) contemplating any act intended to cause the explosion or under Clause (b) covering cases of possession, the prosecution was required to prove that the articles in question were explosive substances. The articles, no doubt, have been described everywhere as bombs but it would be unfair to the appellants if we accept the make-belief case of the prosecution about the articles being "explosive substance" without any legal proof to that effect. The benefit of the omission on the part of the police, we are satisfied, must go to the accused persons.

12. As a matter of fact, we are inclined to disbelieve that the case of the prosecution regarding each of the appellants carrying one bomb each in both hands besides a bagful of bombs in one of the hands of appellant Haider Ali at the time of search and seizure. Being possessed of about two dozens of them there was every likelihood of the appellants resisting the attempt by the police to seize the articles and take them in custody. But, according to the case of the prosecution, no overt act whatsoever was committed by them and they made an object surrender to the police. Considering the situation prevailing at Bhagalpur at the relevant time when the entire town was beset with communal riots we are inclined to think that the police party arrested the appellants on suspicion as rioters. What was the truth we would not know. But, as the prosecution has failed to prove its case of the appellants carrying explosive substances, we have no hesitation in holding that they could not be convicted u/s 4 of the Explosive Substances Act either.

13. The conviction of the appellants both under Sections 3 and 4 of the Explosive Substances Act having been found to be illegal, they could not be convicted u/s 148 of the Penal Code either, which provides for punishment to a person found guilty of rioting with deadly weapon which when used would cause death. In the above premises, the appellants are entitled to acquittal under all counts.

14. In the result, the appeals are allowed, the conviction and sentences awarded to the appellants are set aside. The appellants, who are in custody, are directed to be released forthwith, if not wanted in any other case.