

Supdt. And Remembrancer of Legal Affairs, West Bengal

Vs

Anil Kumar Bhunja and Others

Criminal Appeal No. 98 of 1973

(R.S. Sarkaria, P.N. Shinghal, O. Chinnappa Reddy JJ)

23.08.1979

JUDGMENT

SARKARIA, J. -

1. Whether the giving of firearms by a person holding a licence for repairing and dealing in firearms for repairs to a mechanic who holds no such licence, but does the repair job at his workshop at a place different from the factory or place of business of the license-holder, amounts to "delivery of those arms into the possession of another person" within the contemplation of Section 29(b) of the Arms Act, 1959 (for short, called the 'Act'), is the principal question that falls to be answered in this appeal by special leave directed against a judgment, dated August 16, 1972, of the High Court of Calcutta. It arises in these circumstances :

1a. On or about April 17, 1971, the Calcutta Police while investigating a case, went to premises No. 4, Ram Kanai Adhikari Lane in Calcutta, and, on the ground floor of the building, they discovered a workshop run by Mrityunjoy Dutta, who was then working on a revolver. In the said premises, the police found several other guns, revolvers and rifles. All these firearms were seized by the police.

2. Mrityunjoy Dutta claimed to have received one of the guns so seized from one Matiar Rahaman gun-licensee and the rest from respondents 1 to 4 for repairs. Mrityunjoy Dutta had no valid licence to keep or repair these firearms under the Act. Respondents 1 to 4, however, were holding licences under the Act to run the business of repairing and dealing in firearms.

3. On April 17, 1970, the police charge-sheeted Mrityunjoy Dutta, Matiar Rahaman and respondents 1 to 4 to stand their trial in the Court of the Presidency Magistrate, in respect of offences under Sections 25(1)(a) and 27 of the Act.

4. The trial Magistrate, while considering the question of framing charges, held that there were materials to make out a prima facie case under Section 25(1)(c) of the Act against Mrityunjoy Dutta and under Section 29(b) of the Act against Matiar Rahaman, and charged them accordingly. So far as respondents 1 to 4 are concerned, the Magistrate took the view that the giving of the arms to the accused Dutta, by respondents 1 to 4 for the limited purpose of repairs, did not amount to delivery of possession of those arms within the meaning Section 29(b) of the Arms Act (Act 4 of 1959), and in the result, he discharged the respondents by an order dated November 17, 1971.

5. Aggrieved, the State of West Bengal filed a Criminal Revision against the Magistrate's order before the High Court, contending that delivery of the arms into the possession of a person who did

not have a valid licence for repairs of firearms, is not only a contravention of the provisions of Section 5 of the Act, but also amounts to delivery of firearms by the respondents into the possession of Mrityunjoy Dutta and, as such, the respondents were prima facie liable for an offence under Section 29(b) of the Act.

6. The Division Bench of the High Court, who heard the revision, dismissed it with the reasoning, that respondents 1 to 4, could not be said to have delivered the firearms concerned into the possession of Mrityunjoy Dutta within the meaning of Section 29(b) of the Act, because the respondents who possessed valid licences for repairs as well as for sale of firearms, had given only temporary custody of those arms to Mrityunjoy Dutta for the limited purpose of carrying the repair job, while the effective control over those arms all the time remained with the respondent. In its view, there is no delivery of possession of the firearms so long as control over the arms and authority to use those arms is not transferred to the custodian.

7. Hence, this appeal.

8. The whole case pivots around the interpretation and application of the term "possession", used in Section 29(b) of the Act.

9. Learned Counsel for the appellant-State contends that the question whether a person is in possession of an arm or had transferred and delivered it to another, is largely one of fact. It is submitted that in the instant case, there were three stark facts which more than any other, unmistakably showed that the respondents had given possession of these firearms to Mrityunjoy Dutta : (a) Mrityunjoy Dutta was not a servant or employee of the respondents, but was running his own business of repairing firearms. (b) The firearms were handed over to Mrityunjoy Dutta to be repaired at his own residence-cum-workshop which was not the respondent's licensed place of business, and was in the exclusive control and occupation of Dutta. (c) Mrityunjoy Dutta had no licence for repairing or keeping firearms and the respondents were either aware is maintained that "possession" within the purview of Section 29(b) means immediate possession, and consequently, delivery of even temporary possession and control to an unauthorised person falls within the mischief of the section. It is further urged that the delivery of firearms for repairs to the unlicensed mechanic for repairs, to be carried out at a place other than the factory or place of business specified in the licence of the owners, will amount to an offence under Section 30, read with Section 5 of the Act, also.

10. As against this, Mr. Anil Kumar Gupta has addressed lengthy arguments to support the judgments of the courts below. The sum and substance of his arguments is that the mechanic, Dutta, was only in temporary custody of these arms for the limited purpose of repairing them, as an agent, of the owners, who being licenses in Form IX entitled to repair and keep these firearms, they throughout remained in their lawful possession and control. It is maintained that the delivery of possession contemplated by Section 29 (b) is something more than entrusting the arms to an agent for the limited purpose of repairs. In support of this contention, Mr. Gupta has cited several decisions. Particular reliance has been placed on *Manzur Husain v. Emperor* (AIR 1928 All 55(1) : 29 Cr LJ 97 : 26 ALJ 162); *Sadh Ram v. State* (AIR 1953 HP 121); *Emperor v. Harpal Rai* (ILR 24 All 454); *A. Malcolm v. Emperor* (AIR 1933 Cal 218); *Emperor v. Koya Hansji* (14 Bom LR 964); *Parmeshwar Singh v. Emperor* (AIR 1933 Pat 600); *Gunwantlal v. State of M. P.* ((1973) 1 SCR 508 : (1972) 2 SCC 194 : 1972 SCC (Cri) 678) and *Sullivan v. Earl of Caithness* ((1976) 1 QB 966). Reference was also made to *Halsbury's Laws of England*, Vol. 25, Third Ed., page 874, and *Salmond's Jurisprudence*, 11th Ed.

11. It was next contended that even if the term "possession" in Section 29(b) is susceptible of two interpretation, the one favourable to the accused be adopted. In this connection reference has been made to *Woodage v. Moss* ((1974) 1 All ER 584).

12. The last submission of Mr. Gupta is that since these criminal proceedings have been brooding over the head of the respondents for the last eight years, this Court should not, even if it reverses the opinion of the courts below, direct the Magistrate to frame charges against the respondents and to proceed with the trial. It is emphasised that in any event the offence disclosed against the respondents was purely technical.

13. "Possession" is a polymorphous term which may have different meaning in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic every suffered from too much theorising it is that of "possession". Much of this difficulty and confusion is (as pointed out in *Salmond's Jurisprudence*, 12th Ed., 1966) caused by the fact that possession is not purely a legal concept. "possession", implies a right and fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See *Dias and Hughes*, *ibid.*)

14. According to *Pollock and Wright*,

When a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact, *Salmond* (12th Ed., page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it".

16. In *Gunwantlal* ((1973) 1 SCR 508 : (1972) 2 SCC 194 : 1972 SCC (Cri) 678), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1956, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the fact of each case. In that connection, it was observed :

In any disputed question of possession, specific facts submitted or proved will alone established the existence of the de facto relation of control or the domination of the person over it necessary to determine whether that person was or was not in possession of the thing in question.

17. With this guiding criterion in mind, the Magistrate had to see whether the facts alleged and sought to be proved by the prosecution prima facie disclose the delivery of the firearms by the respondents into the possession of *Mrityunjoy Dutta*, without previously ascertaining whether the

recipient had any licence to retain and repair those firearms within the contemplation of Section 29(b).

18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence has not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in *State of Bihar v. Ramesh Singh* ((1977) 4 SCC 39 : 1977 SCC (Cri) 533 : AIR 1977 SC 2018), the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard to test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence.

19. Now, in the instant case, at that initial stage, it was apparent from the materials before the Magistrate, that basic facts proposed to be proved by the prosecution against the accused-respondents were as follows :

(a) That the respondents held licences, inter alia, in Form IX for repairing and dealing in firearms at the place of business, factory or shop specified in Column 3 of their licences.

(i) The respondents handed over the firearms in question to Mrityunjoy Dutta for repairs.

(ii) Mrityunjoy Dutta did not have any licence for repairing or dealing in firearms.

(iii) (a) Mrityunjoy Dutta was doing the repair job in respect of these firearms at his own residence-cum-workshop which was situated at a place different from the business places specified in the licences of the respondents.

(b) The firearms in question were seized from the workshop-cum-house in the occupation and control of Mrityunjoy Dutta, when the latter was actually in the act of repairing or working on a revolver.

20. There is nothing in these materials to show that at the time of the seizure of these firearms, any of the respondents or any Managers of their concerns, was found present and personally supervising the repair-work that was being done by the mechanic, Mrityunjoy Dutta.

21. These positive and negative facts, in conjunction with other subsidiary facts, appearing, expressly or by implication, from the materials which were before the Magistrate at that initial stage were, at least, sufficient to show that there were grounds for presuming that accused-respondents had committed offences under Section 29(b) and 30 of the Act. Facts (iii)(a) and (b) listed above, inferentially show that by handing over the firearms to Mrityunjoy Dutta to be repaired at the latter's independent workshop, the respondents had divested themselves, for the time being, not only of physical possession but also of effective control over those firearms. There is nothing in those materials to show that before handing over those firearms to Mrityunjoy Dutta for repairs, the respondent had done anything to ascertain that Mrityunjoy Dutta was legally authorised to retain

those arms even for the limited purpose of repairing them. Thus, prima facie, the materials before the Magistrate showed that the respondents had delivered the firearms in question into the possession of Mrityunjoy Dutta, without previously ascertaining that he was legally authorised to have the same in his possession, and as such, the respondents appeared to have committed an offence under Section 29(b) of the Act.

22. Further, by allowing the firearms to be removed to a place other than the places of their business or factory specified in Column 3 of their licences in Form IX, the respondents appear to have contravened condition 1(c) of their licence, the material part of which reads as under :

(c) This licence is valid only so long as the licensee carries on the trade or business in the premises shown in Column 3 thereof

23. Contravention of any condition of the licence amounts to an offence punishable under Section 30 of the Act.

24. In sum, the materials before the Magistrate, prima facie disclosed the commission of offences under Section 29(b) and 30 of the Act by respondents 1 to 4. The Magistrate was thus clearly in error in discharging these accused-respondents.

25. We do not think it necessary to notice and discuss in detail the various decisions cited by the Counsel at the bar, because, as mentioned earlier, the question whether a particular person is or continues to be in possession of an arm (in the context of the Act) is, to a substantial extent, one of fact. This question, often resolves into the issue : whether that person is or continues to be, at the material time, in physical possession or effective control of that arm. This issue, in turn, is a mixed issue of fact and law, depending on proof of specific facts or definite circumstances by the prosecution.

26. At this preliminary stage, therefore, when the prosecution has yet to lead evidence to prove all the facts relevant to substantiate the ingredients of the charge under Section 29(b) levelled against these respondents, a detailed discussion of the principles enunciated in the cited decision, is apt to partake of the character of a speculative exercise.

27. It will be sufficient to say in passing that almost all the decisions of the High Court cited before us were cases under the 'Old' Arms Act (Act 11 of 1878). The ratio of cases decided under the 'Old' Act should not be blindly applied to cases under the Act of 1959 which has, in several aspects, modified or changed the law relating to the regulation of arms. For instance under the 'Old' Act, repairing of arms without a licence, was not punishable, as 'repair' was different and distinct from 'manufacture'. In *Murli v. Crown* (AIR 1929 All 720) and *Tola Ram v. Crown* (ILR 16 All 276), it was held that a person in temporary possession of arms without a licence, for repairing purposes was not guilty under Section 19 of the Act of 1978. But Section 5 of the present Act of 1959, has materially altered this position by requiring the obtaining of a licence for repairing firearms (or other arms if so prescribed). Further, the word "keep" occurring in Section 5 of the 'Old' Act has been replaced by the words "have in his possession" in the present section.

28. Then, in three of these cases, namely, *Manzur Husain* (AIR 1928 All 55(1) : 29 Cr LJ 97 : 26 ALJ 162), *Sadh Ram v. State* (AIR 1953 HP 121) and *Emperor v. Harpal Rai* (ILR 24 All 454), the licence-holder sent his licensed firearm for repairs through a person who had the licence-holder's oral authority, expressly or impliedly given, to carry it to the repairer. It was held that the carrier,

though he held no licence to keep the firearm, could not be said to be in "possession" of it, nor could the licence-holder be said to have parted with the "possession" of the firearm or delivered its possession to an unauthorised person. Similarly, in one of the cases cited, the licence-holder sent his firearm to the Magistrate through his servant or agent for getting the licence renewed. In that case also, it was held that the servant was not guilty of any offence for having in his possession or "carrying" a gun without a licence. The possession was held to be still with the licence-holder-owner of the weapon.

29. The rule enunciated in these decisions has been given a limited recognition in the Proviso to Section 3 of the Act of 1959. Under this Proviso, if a licensed weapon is carried to an authorised repairer by another having no licence, he will not be guilty for carrying that firearm, if he has a written authority of the licence-holder for carrying that weapon to a repairer. Similarly, for carrying a licensed firearm to the appropriate authority for renewal of the licence, written authority of the owner of the weapon is essential to bring him within the protection of the Proviso. In some of these cases referred to by the Counsel, a person was carrying or was in custody of a licensed weapon for use by the licensee. Now, the Proviso to Section 3 of the present Act, protects such carriers or custodians of weapons for use by the licence-holder, only if they do so in the presence of the licence-holder concerned. We have referred, by way of example, to some of these changes brought about by the Act of 1959, only to impress on the trial Court that in considering the application of the ratio of the cases decided under the Act of 1878, to those under the present Act great caution and discernment is necessary.

30. For all the reasons aforesaid, we allow this appeal and set aside the orders of the courts below whereby respondents 1 to 4, herein, were discharged. Although offences under Sections 29(b) and 30 of the Act are summons cases, the Magistrate has followed the warrant procedure, obviously because an offence under Section 25 of the Act, for which Mrityunjoy Dutta was being jointly tried with respondents 1 to 4, was a warrant case. Moreover, trial of a summons case as a warrant case does not amount to an illegality, but is mere irregularity that does not vitiate the trial unless there is prejudice. We, therefore, send the case back to the trial Magistrate with the direction that he should frame charges in respect of offences under Sections 29(b) and Section 30 of the Act against the accused-respondents 1 to 4 and proceed further with the trial in accordance with law. We decline the submission made on behalf of these respondents that on account of their prolonged harassment and expense, which are necessary concomitants of protracted criminal proceedings extending over eight years, they should not be put on trial now for offences, which, according to the Counsel, are merely technical. Even so, we think, this is a circumstance to be taken into consideration by the trial Court in fixing the nature and quantum of sentence, in the event of the accused being found guilty.

31. Before parting with this judgment, we will, however, set it down by way of caution that the Magistrate while assessing the evidence and recording his findings on its basis with regard to proof or otherwise of the factual ingredients of the offences with which the accused may stand charged, shall not allow himself to be unduly influenced by anything said in this judgment in regard to the merits of the case.

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