

A MOHMED RAFIQ ABDUL RAHIM SHAIKH

v.

THE STATE OF GUJARAT

(Criminal Appeal No. 1078 of 2008)

B SEPTEMBER 13, 2018

[S. A. BOBDE AND L. NAGESWARA RAO, JJ.]

Arms Act, 1959 – ss. 25(1)(a), 25(IAA) r/w s. 35 – Prohibition of acquisition or possession, or of manufacture or sale, or prohibited arms or prohibited ammunition – On facts, cartridges found in the car driven by accused A-1 in a drunken state – A2 was the owner of the car – Disclosure made by A1 about some more arms hidden in a bungalow of which A4 was shown as the occupier in the records – Weapons and live cartridges found inside the cellar of that house – A3 had stored the weapons and later on gave to A1 from the cellar – Conviction of A2 and A4 for commission of offence u/ss. 25(1)(a), 25(IAA) r/w s. 35 by the courts below – Sustainability of – Held: Not sustainable – As regards A2, it is necessary to prove that the accused was in conscious possession at some point in time before the discovery and retained control of the objects at the time of the recovery – Accused was neither in the car when it was apprehended nor anywhere near the car – A-2 was arrested only because he was found to be the registered owner – It is not even the prosecution’s case nor the courts below have rendered a finding that A-2 was in constructive possession of the live cartridges recovered from the car – Conviction of A2 u/s. 25(IAA) wholly unwarranted – As regards, A4 he was not in possession or occupation of the house for almost three months as he was in detention – There is no evidence that the house was locked from the outside – Window of the room, which led to the cellar, was said to be locked from inside and an iron gate that had a lock on the outside had to be broken – Prosecution could not establish intention and consciousness of the A4 of the arms and ammunition found in A4’s house – Thus, A4 was not in constructive possession of the firearms and conviction wholly unwarranted.

Gunwantlal vs. The State of Madhya Pradesh (1972) 2 SCC 194 : [1973] 1 SCR 508 – referred to.

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Case Law Reference A

[1973] 1 SCR 508 referred to Para 20

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1078 of 2008.

From the Judgment and Order dated 11.09.2007 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 912 of 2004. B

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Criminal Appeal No. 1901 of 2008.

Sanjay Jain, Saleem, S. S. Rawat, Advs. for the Appellant. C

Shubharanshu Padhi, Ms. Mamta Singh for Ms. Hemantika Wahi, Advs. for the Respondent.

The Judgment of the Court was delivered by

S. A. BOBDE, J. 1. The appellants in these appeals are Salim Shamsuddin Shaikh in Criminal Appeal No. 1901 of 2008 (hereinafter referred to as A-2) and Mohmed Rafiq Abdul Rahim Shaikh in Criminal Appeal No. 1078 of 2008 (hereinafter referred to as A-4). The Criminal Appeals are filed against the final Judgment and Order dated 11.09.2007 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 635 of 2004 and 912 of 2004 respectively. Wherein, the High Court has dismissed both the appeals and upheld the conviction and sentence passed by the Additional Sessions Judge, Ahmedabad in Sessions Case No. 46/1999 and 190/2000. A-4 and A-2 are convicted for offences committed under Section 25(1)(A) read with Section 35 of the Arms Act, 1959 and sentenced to undergo three years rigorous imprisonment and fine of Rs. 5000/-. A-4 and A-2 are also convicted under Section 25 (1AA) read with Section 35 of the Arms Act, 1959 and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs. 10,000/- each and in default of making payment of fine to undergo six months imprisonment. Both the sentences were ordered to run concurrently. D
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Facts

2. On 4.2.1993 at about 7 pm one blue colored Maruti Fronty car without a number plate was stopped by Constable Manuji Knauji Rajput. It was driven by Noormahammad Mohammadyasin Shaikh (herein after H

A referred to as A-1) in a drunken state. Apparently, a police inspector at the Dariapur Police Station received information that A-1 was in the business of transportation of illegal weapons together with Abduvahab Abdulmajid Pathan (hereinafter referred to as A-3) and that there are some cartridges in the Maruti Fronty car. The car was then searched.

B 3. According to the prosecution six live cartridges were found in the backside of the car in the cavity next to the speaker. These cartridges had the name 'L.V London' on them and they were meant for use in a .45 revolver, which is a prohibited bore. The rest of the prosecution story deals with how the weapons have said to be recovered from the house of A-4.

C **Accused No. 2- Salim Shamsuddin Shaikh**

D 4. A-2 who was nowhere near the car has been convicted by the learned Sessions Court u/s 25(1)(a) & 25 (1AA) read with section 35 of the Arms Act, 1959 for a period of seven years only because he was the owner of the car Maruti Fronty registered as GCB 122.

5. Section 25(1)(a) of the Arms Act, 1959 reads as follows:

E *“(l) Whoever –(a) manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5; or*

(b) shortens the barrel of a firearm or converts an imitation firearm into a firearm in contravention of section 6; or

F *(d) bring into, or takes out of, India, any arms or ammunition of any class or description in contravention of section 11, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.”*

G 6. Section 25 (1A) of the Arms Act, 1959 reads as follows:

H *“Whoever acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to ten years and shall also be liable to fine”.*

7. In effect, this section provides for the punishment of a person who has in his possession, etc.-prohibited arms or prohibited ammunition in contravention of Section 7. Section 7 prohibits possession etc. of prohibited arms or ammunition it reads as follows:

“7. Prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition – No person shall-

(a) *acquire, have in his possession or carry;*

(b) *....*

(c) *....”¹*

8. Section 25 (1)(a) essentially makes a person who is found to be in possession for sale, transfer etc. of any prohibited arms or ammunition in contravention of Section 5 punishable with imprisonment for a term, which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

9. The crucial question *vis- a -vis* the conviction of A-2 is whether he was found in possession of prohibited ammunition: the six live cartridges seized from the Maruti Fronty car owned by him.

10. We have no hesitation in saying that the conviction of this Accused under Section 25 (1AA) is wholly unwarranted since he was not in possession of the prohibited ammunition at all, much less for the purpose of sale which is a requirement for attracting the provision of Section 25 (1AA). It reads as follows:

“(1AA) Whoever manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer or has in his possession for sale, transfer, conversion, repair,

¹ Prohibition of acquisition or possession, or of manufacture or sale, or prohibited arms or prohibited ammunition –

No person shall –

(a) acquire, have in his possession or carry ; or

(b) [[*Note: Subs. by Act 42 of 1988, s. 4 (w.e.f. 27-5-1988)*] use, manufacture,] sell, transfer, convert, repair, test or prove ; or

(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair test for proof, any prohibited arms or prohibited ammunition unless he has been specially authorized by the Central Government in this behalf.

A *test or proof any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.”*

B 11. It is nobody’s case that A-2 was found in actual possession of the cartridges. The cartridges were recovered from a car, which was driven by A-1 in a drunken state. A-2 was nowhere near the car. A- 2 was arrested only because he was found to be the registered owner of the car during the course of investigation. This fact of ownership has not been contested by A-2 since he on his own made an application for his car as the registered owner and the Court in fact granted this application.

C 12. The only question is whether the A-2 can be said to have been in possession of the six cartridges found in the Maruti Fronty car?

D 13. The Trial Court has merely on the basis of the uncontested fact that A-2 is the owner of the car convicted him for a period of seven years u/s 25(1)(a), 25 (1AA) read with Section 35 of the Arms Act, 1959. The High Court upheld that conviction. The Courts below have not even rendered a finding that A-2 is in constructive possession of the six live cartridges recovered from the car. It might be remembered that this Accused was neither in the car when it was apprehended nor anywhere near the car.

E 14. The prosecution has not led any evidence to establish the complicity of A-2. There is no evidence that this accused knew what A-1 was carrying in the car or that he had kept the prohibited ammunition in the car. There is no evidence to establish the knowledge or even the consent of A-2.

F 15. The question whether A-2 had any control over either the car or the cartridges found in the car does not even arise for consideration. Without any evidence of the proximity of A-2 with the car, or how he handed over the prohibited ammunition to A-1 or how he kept them in the car makes it difficult to imagine how he could have been convicted for possession of prohibited ammunition.

G 16. It is thus clear that this accused cannot be said to have been in possession of the six live cartridges allegedly recovered from the car. A-2 cannot have said to be in possession- actual or constructive. It may be

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of some consequence, that A-2 is an estate cum car broker who dealt in used cars and may have given the car, as claimed by him in his defense to A-1 who wanted to purchase it. The Trial Court has disbelieved this defense only on the ground that A-2 continued to be the registered owner of the car. A

17. It is also not possible to sustain the conviction of the Accused u/s 35 of the Arms Act, 1959² that renders each of the several people who may have been found in joint occupation/ joint control of any premises, vehicle or other place, as if the accused has committed the offense alone. B

18. We fail to see how the conviction of A-2 is sustainable u/s 35 of the Arms Act, 1959 since it is not even the prosecution's case, that the A-1 and A- 2 were found in joint control or occupation of the Maruti Fronty car from which the prohibited ammunition was recovered. C

19. We do not take the view that a remote location of the firearm of ammunition or recovery from a remote place would exonerate an accused in all cases. But it is necessary to prove that the accused was in conscious possession at some point in time before the discovery and retained control of the objects at the time of the recovery. D

20. In Gunwantlal vs. The State of Madhya Pradesh³, this Court held that a person cannot be charged with the offences unless it can be shown that he had the knowledge that any sort of prohibited item was present in his house. E

*"5. ***** In some cases under Section 19(1)(f) of the Arms Act, 1878 it has been held that the word "possession" means exclusive possession and the word "control" means effective control but this does not solve the problem. As we said earlier, the first precondition for an offence under Section 25(1)(a) is the element of intention, consciousness or* F

² 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 if it has been or is being committed by him alone. G

³ (1972) 2 SCC 194

A *knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject*
B *to that power and control. In any disputed question of possession, specific facts admitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question.”*

C 21. We thus hold that the conviction of Salim Shamsuddin Shaikh (A-2) cannot be sustained and we accordingly set it aside.

Accused No. 4 -Mohmed Rafiq Abdul Rahim Shaikh

D 22. A-4 was implicated when A-1 is said to have disclosed to the police that there are some more arms hidden in another location; Bungalow 19 Satyam Society. A-4 is said to be guilty as he was the occupier of the said bungalow according to the Ahmedabad Municipal Corporation records.

The Search

E 23. The police entered the bungalow in the presence of two panchas and A-1. The house is a two-storied building with a cellar. The police found a window, which was closed from inside. A-1 stated that the weapons and live cartridges found inside the cellar were stored there by A-3.

F 24. A-1 further stated that A-3 had given him the weapons from the cellar. An iron door was broken through which the party entered the room and found the automatic weapons and cartridges in the cellar as stated by A-1. Additionally, in a gold bag an AK -47 rifle was found. In another bag, seven kattas (country revolvers) were found. White metal was found in another bag made from spun material.

G 25. The Panchnama has the description of the weapons and the cartridges found. There were about fifty live cartridges for the AK 47 rifle and about fifty other live cartridges of 12 bore. Other cartridges were of varying bores .38, 7.65 etc. Surprisingly, around 18-fired cartridges are said to have been found. The white metal wire was found
H to be silver.

26. The details of the seizure are not strictly relevant for a decision of this case. A-4 has been convicted only on the basis of his admission in the cross-examination, wherein he is shown as the occupier of the house in the records of the Ahmedabad Municipal Corporation. It is not a disputed fact that A-4, was not present in the house nor had he been present in the house for days before the recovery. In fact, it is not in dispute that from 15.12.1992 – 7.1.1994 he was in prison. A B

27. Therefore, he was in prison when his house was raided on 5.2.1993. Strangely, the panchnama does not state that the room, which led to the cellar from where the weapons were recovered, was even locked from outside. It records that the window presumably from which the entry was gained was locked from inside. There is nothing to show that the lock on the iron Gate was put there by A-4. C

28. Obviously, A-4 had not occupied this house from the date of his detention i.e. 15.12.1992 that is about three months before the raid took place. A-4 was certainly not found in actual possession of the weapons or even the house in which the weapons and ammunition were found. D

29. In Gunwantlal (supra) this Court has held in Para 5 that:

*“5, ****the first precondition for an offence under Section 25(1)(a) is the element of intention, consciousness or knowledge with which a person possessed the firearm before it can be said to constitute an offence and secondly that possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power and control.”* E F

30. To bring home a charge it was obviously necessary for the prosecution to establish intention and consciousness of the A-4 of the fire arms and ammunition found in A-4’s house. This was not done. But even if one considers whether A-4 was in constructive possession the charge and conviction cannot be sustained. For, in order to consider a finding of constructive possession it is necessary that either there is proof that the Accused had placed the weapons or was at least in control of the house in which they were found. G

31. In this case, the only proof relating to the alleged complicity of the Accused is that he has not been in possession or occupation of the H

- A house for almost three months as he was in detention. Strangely, there is no evidence that the house was locked from the outside. The window of the room, which led to the cellar, was said to be locked from inside. Additionally, an iron gate that had a lock on the outside had to be broken. We consider it highly inappropriate in these circumstances to uphold a conviction of constructive possession of the firearms with which A-4 is not shown to have had any connection or control.

32. We, accordingly, set aside the conviction of Mohmed Rafiq Abdul Rahim Shaikh (A-4) under Section 25 (1) (a) & 25 (1AA) read with Section 35 of the Arms Act, 1959. Since the Accused was in jail it is not possible to hold that he was in joint occupation of the house in accordance to Section 35 of the Arms Act, 1959.

33. Both the appeals are allowed accordingly.

Nidhi Jain

Appeals allowed.