

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No.964/2011**

% Reserved on: 16th January, 2012

Decided on: 30th January, 2012

UPDESH @ CHINTU Appellant.

Through: Mr. Anil K. Gujral, Advocate.

Versus

STATE Respondent

Through: Mr. Mukesh Gupta, APP for State
with S.I. Saminder Singh.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeal is directed against the judgment dated 7th July, 2011 and order on sentence dated 11th July, 2011 passed by learned Additional Sessions Judge convicting the Appellant for offence punishable under Section 25 Arms Act. The Appellant was sentenced to undergo Rigorous Imprisonment for three years and pay a fine of Rs.10,000/- and in default of payment of fine to further undergo Simple Imprisonment for a period of three months.

2. Learned counsel for the Appellant contends that the entire approach of the learned Appellate Court was patently wrong as it did not weigh the reasons based on which the learned Trial Court had acquitted the appellant. Learned Appellate Court ignored the golden rule that where an order of acquittal is recorded by the Trial Court, the Appellate Court must bear in

mind that there is double presumption in favour of the accused. Learned Appellate Court has failed to appreciate the facts of the case and ignored that neither PW-7, who recorded the disclosure statement in case FIR No.154/2009, nor the Investigating Officer in their statement(s) before the Court brought on record any disclosure statement. Moreover, PW-7 in his cross-examination had admitted that the appellant did not state that he had kept arms and ammunition in his house in the said alleged disclosure statement. No disclosure statement has been exhibited or marked during the examination of PW-7 or PW-8. Learned Appellate Court erred in law as well as on the facts as it has ignored the clear contradiction elicited in the cross-examination of PW-7 and PW-8. It is further contended that the learned Appellate Court has erred in concluding that the alleged recovery has been effected from the exclusive possession of the Appellant whereas there is no evidence on record to suggest the same. The link evidence connecting the Appellant to the room from where the recovery was made is missing in the present case. In view of missing links and contradiction in the testimonies of the prosecution witnesses, the view taken by the learned Metropolitan Magistrate acquitting the Appellant was correct. Learned counsel has placed reliance upon *Ramesh Babulal Doshi vs. State of Gujarat*, (1996) 9 SCC 225 and *Bhaiyamiyan @ Jardar Khan & Anr. vs. State of Madhya Pradesh*, 2011 CrL. L.J. 577 SC, to contend that in an appeal against acquittal, the Appellate Court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. Therefore, the judgment passed by the learned Appellate Court reversing the order of acquittal is erroneous and liable to be set aside.

3. Per contra, learned APP for the State contends that there is no illegality in the impugned judgment as stated by the learned counsel for the appellant. Learned Additional Sessions Judge has considered all the relevant aspects which have arisen in the present case and correctly convicted the appellant. The contradictions as pointed out by the counsel for the Appellant are not glaring contradictions which go to the root of the prosecution case. The disclosure statement of the Appellant has been recorded only before registration of FIR No.111/2009 and the same could not have been recorded thereafter in the said case. Thus, the view taken by the learned Additional Sessions Judge is correct which requires no interference by this Court. The present appeal is liable to be dismissed being devoid of merit.

4. I have heard learned counsel for the parties and perused the record.

5. Briefly, the prosecution case is that the accused/appellant was in custody in case FIR No.154/2009 under Sections 452/307/34 IPC r/w Sections 25/27 Arms Act registered at PS Palam Village. The accused made a disclosure statement before the officials of Crime Branch revealing that he had a Cache of illegal arms and ammunition concealed in his home. Thereafter, on 6th July, 2009 at about 10.45 PM the accused/appellant led the police party to his house at House No.RZ-44/A, J-Block, Dharmapura Colony, Najafgarh, New Delhi from where five pistols with forty live cartridges were recovered lying hidden in a polybag kept in one green colour bag in the box of his double bed. The said arms and ammunition were found to be in his possession without any permit or licence and in contravention of Notification of Delhi Administration. Thereafter, the present FIR No.111/2009 was registered under Section 25 of Arms Act against the Appellant at PS Crime Branch, New Delhi. After the investigation,

chargesheet was filed. After recording statements of prosecution witnesses and the statement of Appellant under Section 313 Cr.P.C. learned Metropolitan Magistrate acquitted the Appellant. Aggrieved by the said order the State filed an appeal before the learned Additional Sessions Judge. Vide order dated 7th July, 2011 learned Addl. Sessions Judge reversing the order of acquittal, convicted the Appellant under Section 25 Arms Act and vide order dated 11th July, 2011 sentenced him as mentioned above.

6. Learned Metropolitan Magistrate while acquitting the Appellant had observed that there was no formal disclosure statement recorded by the investigating authorities in the present case and the recovery was made on the information which was available with the police prior to the disclosure statement. Thus, the recovery was not pursuant to the information revealed which casts a doubt on the alleged recovery. Learned Metropolitan Magistrate further observed that in the present case lack of inclusion of any public or independent witnesses raised a genuine doubt regarding the prosecution case. It was further observed that without any written orders or permission from the higher authorities the accused was taken from Crime Branch, Prashant Vihar to Crime Branch, R.K. Puram which is against the provisions of law. Hence, giving the benefit of doubt the accused/Appellant was acquitted.

7. On the other hand, learned Additional Sessions Judge marshalling the evidence placed before him, concluded that the prosecution has established its case and convicted the Appellant. It may be noted that the learned Addl. Sessions Judge has observed that the present FIR being FIR No. 111/2009 was registered only after recovery was effected based upon the disclosure statement of the Appellant in the other FIR No. 154/2009. Hence, the

disclosure statement could not have been recorded earlier in the present case. It has been further observed that shortly after the Appellant was apprehended in FIR No. 154/2009 by Crime Branch, Prashant Vihar, it was revealed to the police officials that he was hiding some arms and ammunitions illegally which is an offence. For the said purpose, he was interrogated at Crime Branch, R.K. Puram whereafter he disclosed the place of hiding of the said arms and ammunitions. Learned Additional Sessions Judge has noted that the recovery of the illegal weapons cannot be discarded simply on the ground that the officials did not seek proper permission in writing before taking the accused to Crime Branch, R.K. Puram. It has been further observed that no suggestions in regard to the recovery effected from the house of Appellant has been put to any of the recovery witnesses. No suggestion has been put to them that the house did not belong to the Appellant or that the said arms and ammunition were not got recovered from the exclusive possession of the Appellant. Thus, in view of the evidence placed on record learned Additional Sessions Judge convicted the Appellant.

8. It may be noted that PW7 SI Ritesh Kumar in his testimony has deposed that on 6th July, 2009 he was posted at PS Crime Branch, Prashant Vihar. Accused Updesh @ Chintu was arrested by him on 4th July, 2009 from Nazafgarh in case FIR No. 154/2009 under Sections 452/307/34 IPC r/w 25/27 Arms Act registered at PS Palam Village. In this FIR police custody of accused was taken on 5th July, 2009 for two days. During investigation, he revealed that he was in possession of arms and ammunitions. On 6th July, 2009 as per the directions of senior officers he along with his staff took accused to Crime Branch R.K. Puram. Accused was interrogated by him and PW8 ASI Rajbir Singh. During interrogation

he revealed that 10-15 days prior to his arrest he had gone to Agra Jail where he met one Ashok Bhadauriya and brought some illegal arms, pistol and live cartridges from the associates of Ashok Bhadauriya. He further disclosed that he had hidden all the illegal arms in his House No. RZ-44-A, J Block, Dharampur Colony, Nazafgarh. This disclosure statement was recorded in case FIR No. 154/2009.

9. PW8 ASI Rajbir has stated that in case FIR No. 154/2009 under Section 186/353/307/34 IPC read with Section 25 Arms Act, accused Sonu Kharab, Mukesh and Rohit @ Kaisa were arrested and during their disclosure they revealed that Updesh @ Chintu was the supplier of illegal arms and was also involved in commission of crime in many cases. On this ACP and Inspector Suresh Kumar constituted a team to ascertain these facts. The team comprised of SI Shiv Raj Tyagi, ASI Rajbir, HC Satpal, HC Sanjay & HC Yash Pal. Updesh @ Chintu had been arrested in Case FIR No. 154/2009. This witness has further deposed that through secret information on 6th July, 2009 it was revealed to HC Satpal that accused Updesh had hidden huge illegal arms and ammunition. Thereafter on the directions of senior officers SI Ritesh was called who brought the accused to office on AEC, Crime Branch, R.K. Puram. Accused was interrogated who disclosed that he had brought pistol and cartridges from Agra and has hidden the same in his residential house No. RZ-44-A, J Block, Dharampura, Nazafgarh. SI Ritesh recorded the statement of accused in his case FIR No. 154/2009.

10. Both PW7 & PW8 have further deposed that pursuant to recording of the disclosure statement of accused Updesh in case FIR No. 154/2009 at about 10:00 p.m. PW7, PW8 along with SI Shiv Raj Tyagi, HC Sanjay, HC

Yashpal, HC Stapal and some other staff went to Najafgarh, Tura Mandi where they requested 5-6 passersby to join the raiding party but none agreed. Thereafter, the accused/Appellant pointed out towards H.No. RZ-44-A, J Block, Nazafgarh and led to his room and got recovered green colour bag from the box of double bed. The bag contained one green colour poly bag containing five pistols and 40 live cartridges. “Best Wishes” and “Thank You” were written on the bag. The pistols had ‘made in USA’ and ‘made in China’ engraved. Further PW6 HC Sanjay has also deposed the same facts as deposed by PW7 and PW8. After seizure of all the recovered articles and recording the contemporaneous documents, accused Updesh was formally arrested in present FIR No. 111/2009.

11. A perusal of the testimony of PW6, PW7 and PW8 shows that recovery of the arms and ammunition was made pursuant to his disclosure in case FIR No. 154/2009. Thus, recording of a disclosure statement in the present case could not have taken place. The contention of the learned counsel that recovery was not pursuant to disclosure statement of the Appellant is liable to be rejected. The recovery of the article is pursuant to disclosure statement which is admissible under Section 27 of the Indian Evidence Act. The registration of FIR is not a sine qua non for the recovery to be effected. Recovery can be effected even on an oral disclosure statement. Further the conduct of the accused leading the police party to his house and the specific place in the house from where the recovery of arms and ammunitions is consequently made is also admissible under Section 8 of the Evidence Act. Reference in this regard is made to *State of Himachal Pradesh Administration Vs. Om Prakash* (1972) 1 SCC 249.

12. Further, the contention of the learned counsel that the recovery is not from exclusive possession of the Appellant as the house was not of the Appellant alone holds no merit as the accused led the police party to the house from where recovery was made and it was only in his knowledge that where the arms and ammunitions were hidden. This specific knowledge of Appellant fulfills the requirement of his being in exclusive possession of the arms. All the prosecution witnesses have been sufficiently cross-examined by counsel for the Appellant but nothing could be elicited to demolish the case of prosecution.

13. Hon'ble Supreme Court in *Gunwantilal vs. The State of Madhya Pradesh*, AIR 1972 SC 1756 held that:

“4. Section 25(a) in so far as it is relevant states:

whoever acquires, has in his possession or carries any firearm or ammunition in contravention of Section 3...shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

5. What is meant by possession in the context of this section ? Is it that the person charged should be shown to be in physical possession or is it sufficient for the purposes of that provision that he has constructive possession of any firearm or ammunition in contravention of Section 3 which prohibits him to be in such possession without a licence. It may be mentioned that under Section 19 of The Arms Act of 1878, an offence corresponding to Section 25(1)(a) is committed if a person had in his or under his control any arms or ammunition in contravention of Section 14 and 15 of that Act. The word 'control' under Section 25(1)(a) has been omitted. Does this deletion amount to the legislature confining the offence only to the case of a person who has physical possession or does it mean that a person will be considered to be in possession of a firearm over which he has constructive possession or over which

he exercises the power to obtain possession thereof when he so intends ?If the meaning to be given to the word "possession" is that it should be a physical possession only, then certainly the charge as framed on the facts of the prosecution case will not be sustainable but if the meaning to be given to the word "possession" is wider than that of actual or physical possession then it is possible, if the evidence produced by the prosecution is such as would sustain a finding,

.....

The possession of a firearm under the Arms Act in our view must have, firstly the element of consciousness or knowledge of that possession in the person charged with such offence and secondly where he has not the actual physical possession, he has none-the-less a power or control over that weapon so that his possession thereon continues despite physical possession being in someone else. If this were not so, then an owner of a house who leaves an unlicensed gun in that house but is not present when it was recovered by the police can plead that he was not in possession of it even though he had himself consciously kept it there when he went out. Similarly, if he goes out of the house during the day and in the meantime someone conceals a pistol in his house and during his absence, the police arrives and discovers the pistol he cannot be charged with the offence unless it can be shown that he had knowledge of the weapon being placed in his house. And yet again, if a gun or firearm is given to his servant in the house to clean it, though the physical possession is with him nonetheless possession of, it will be that of the owner. The concept of possession is not easy to comprehend as writers of (sic) have had occasions to point out. 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 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. 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.

14. Hence in the present case, the entire chain of events leading to registration of FIR against the Appellant is complete. The evidence of recovery made from the exclusive possession of the Appellant is cogent and clear which proves the case of the prosecution beyond reasonable doubt. The minor contradictions pointed out in regard to joining of public witnesses do not go to the root of the prosecution case. PW7 and PW8 have deposed that efforts were made to join public witnesses at Tura Mandi, Nazafgarh but none agreed. Thus non-joining of public witness does not dent the otherwise cogent testimony of police witnesses.

15. I find no force in the contention of the learned counsel for the Appellant that in absence of any formal permission from the authorities transfer of the Appellant from Crime Branch, Prashant Vihar to Crime Branch, R.K. Puram discredits the prosecution story as the witnesses have deposed that senior officers were informed and on their directions only the accused was taken to R.K.Puram. It may be noted that Crime Branch is one unit of Delhi Police and one Police station and if the accused is taken from one unit of a police station to another, it is not an illegality. Thus, in view of the facts and circumstances of the present case, I find that the view taken by the learned Additional Sessions Judge is the correct view. The view taken by the Learned Metropolitan Magistrate was a perverse view and was thus

rightly set aside by the Learned Additional Sessions Judge. The appeal is dismissed. Appellant is in custody. He will undergo the remaining sentence. The Appellant be informed through Superintendent, Tihar Jail.

(MUKTA GUPTA)
JUDGE

JANUARY 30, 2012
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