

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 4925 OF 2014

Khaled Hamza Ali Naji.

..Petitioner.

Versus

State of Maharashtra & Another.

..Respondents.

Mr. Niranjan Mundargi, Dawood Madviwala, Ms. Tahira Mandiwala, Mr. Hemant Telkar i/b Mandviwala & Co., for the Petitioner.

Mr. J. P. Yagnik, learned APP for the State.

Coram : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.

Date : **March 19., 2015.**

P. C. :

. Rule. Rule made returnable forthwith. By consent, taken up for final hearing.

2. This writ petition under Article 226 of the Constitution of India and section 482 of the Code of Criminal Procedure, 1973 is filed seeking to quash FIR bearing No.SPL. LAC. No.7 of 2013 registered with Sahara Police Station, Mumbai against the Petitioner for the offence punishable under sections 3 and 25 of the Indian Arms Act, 1959. It is alleged that on 7th June

2013 at about 2.14 a.m. the auto-screen machine at Level-I found baggage of one passenger of Flight No.IY-855 having tag No.AI688207 as suspicious, hence the same was forwarded to Level-II. The officer working at Level-II found the image of the said baggage suspicious and similar to that of a bullet and hence he forwarded the said baggage to Level-III. The Assistant Security Officer at Level-III also found the image to be that of bullet and therefore he forwarded the same to Level-IV.

. It is alleged that as the said baggage was required to be inspected in the presence of the owner of said baggage, the officer at Level-IV informed the Yemen Airline's Officers that the owner of the said baggage be called to Level-IV. The first informant checked the said baggage in the presence of the Petitioner and he found the questioned object was a live bullet kept in the front side pocket of said baggage. On enquiry, it transpired that the Petitioner did not have any valid licence for carrying arm and ammunition issued by the Government of India. He could not give information as to wherefrom he had got the said bullet. Said information was conveyed to the Airport

authority. The Petitioner's immigration was cancelled and his custody was handed over to the police head constable of Sahara Police Station. The live bullet was also given to the police for further inquiry. Hence the FIR in question came to be registered against the Petitioner.

3. The case of the Petitioner is that he is a citizen of Republic of Yemen, which is a country having extremely volatile situation. The citizens of Yemen are required to possess weapons for their personal safety due to the continuous unrest in the said country. He holds a valid arms licence issued by the Competent Authority of Yemen, which licence was valid for the relevant period. It is also case of the Petitioner that he is a Yemeni businessman and is the third generation in the family engaged into dealing in Kashmiri Shawls' business and since 1993 he had made about 50 trips to India in connection with his business deals. The Petitioner contends that one single bullet was allegedly found in the check-in baggage, over which he had no control at the relevant point of time.

4. Mr. Mundargi, learned Counsel appearing for the Petitioner submitted that in order to bring home the guilt under sections 3 and 26 of Arms Act, 1959 conscious possession of the said bullet must be proved and the facts and circumstances of the present case do not show such conscious possession. He has relied upon the unreported decision of Delhi High Court in Gaganjot Singh v. State [W.P. (CRL) No. 1169 of 2014 dated 1st December 2012.

5. Mr. Yagnik, learned APP for the State on the contrary opposed the petition very vehemently. He submitted that live bullet was found in the Petitioner's check-in baggage over which only the Petitioner had control. He also submitted that in order to bring home the charge under sections 3 and 26 of the Arms Act, mere possession would be sufficient without requiring anything more and therefore FIR cannot be quashed at this stage.

6. We have perused the records and considered the submissions advanced by learned Counsel appearing for the Petitioner and learned APP for the State. In Gunwantlal vs. State

of Madhya Pradesh [AIR 1972 SC 1756] the Apex Court emphasised the necessity for the prosecution to prove that possession of the arms or ammunition was conscious one. The relevant observations in para-5 of the decision read thus :

“..... The possession of 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 nonetheless a power or control over that weapon so that his possession thereon continues despite physical possession being in someone else. As we said earlier, the first pre-condition 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.”

7. In Sanjay Dutt vs. State through CBI Bombay [(1994) 5 SCC 410], the Constitution Bench of the Supreme Court held that the expression occurring in section 11 of the TADA Act must mean possession with the requisite mental element, i.e., conscious possession and not mere custody without the awareness of the nature of such possession. There is mental element in the concept of possession. The relevant observations of the Apex Court are as under :

“The meaning of the first ingredient of “possession” of any such arms etc. is not disputed. Even though the word 'possession' is not preceded by any adjective like 'knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood (See *Warner v. Metropolitan Police Commissioner* 1969(2) AC 256 and *Sambasivam v. Public Prosecutor, Federation of Malaya*, 1950 AC 458.)”

8. It is thus clear that mere possession of fire arm or ammunition would not constitute offence under Section 3 and 25 of the Arms Act. The essential requirement is the knowledge of possession or power or control over the arm or ammunition when not in actual possession.

9. In the present case it is to be noted that the petitioner is a Yemeni National and he was possessing a valid arm license issued by the competent authorities in Yemen. The petitioner is a businessman and since 1993, he has made about 50 trips to India in connection with his business dealings. On 7th June 2013, the

petitioner was travelling from India to Yemen. He had checked in his baggage at Sahar International Airport and would have received the same at Yemen. Having checked in the baggage, he would have no control over the same till the receipt of the same at Yemen.

10. It is pertinent to note that the bullet was allegedly recovered from the outer unlocked open side compartment of the bag. The said bullet was not recovered in the presence of the petitioner at the time of scrutiny or checking in the baggage but was allegedly recovered subsequently i.e. after the baggage was checked in.

11. The FIR as well as other material collected in the course of the investigation reveal that apart from the recovery of single live bullet from the outer unlocked side pocket of the baggage, there is no material to show that the petitioner was conscious of the possession of the bullet in the said baggage. This being the case, it cannot be said that the petitioner was in conscious possession of the said live bullet or that he had control

over the said bullet.

12. Under the circumstances and in view of the principles laid down by the Apex Court in the case of *Gunwantlal (Supra)*, which has also been followed by Delhi High Court in the case of *Gaganjot Sing (Supra)*, we are of the considered view that there is no sufficient material to level charge against the accused for offence punishable under Sections 3 and 25 of the Arms Act.

13. Under the circumstances, Rule is made absolute in terms of prayer clause (b).

[SMT. ANUJA PRABHUDESSAI, J.]

[RANJIT MORE, J.]