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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.2394 OF 2017.

M. A. Latif Shahrear Zahedee	]
age: 39 years, Occupation : Business	] <u>Petitioner</u>
r/o 23 B. B. Road, Jhenaidah	] Ori.accused
Jhenaidah Sadar 7300	]
BANGLADESH	]

V/s.

1. The State of Maharashtra	]
Through	]
The Principal Secretary,	]
Home Department, Mantralaya	]
Mumbai 400 032	]
	]
2. The Commissioner of Police	]
Crawford Market	] Respondents.
Mumbai 400 001	]
	]
3. The Senior Inspector of Police	]
Airport Policee Station	]
C.R.No.16 of 2013	]

Mr. Niteen Pradhan, Senior Advocate i/by Ms.
Shubhada Khot, for the Petitioner.
Mrs. Aruna Pai, APP for the Respondent State.

**CORAM : RANJIT MORE &
DR.SHALINI PHANSALKAR-JOSHI, JJ.**

DATE : 14th NOVEMBER, 2017.

ORAL JUDGMENT : [PER: DR. SHALINI PHANSALKAR-JOSHI, J.]

1] Rule. Rule made returnable forthwith. Heard finally

with consent of learned counsel for both the parties.

2] This writ petition is filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, for quashing the proceeding in C.C. NO.301/PW/2015, pending on the file of the Metropolitan Magistrate, 66th Court, Andheri, Mumbai, arising out of C.R. No.16 of 2015, registered with Airport Police Station, Mumbai.

3] It is the case of the petitioner that he is permanent resident of Bangladesh and for the purpose of his business, he has travelled to India on several occasions. On 25.9.2013, he left Dhaka, by Jet Airways 9W0273 Flight to Kolkata, for the purpose of business. From Kolkata, he boarded Jet Airways 9W2364 Flight to Pune. Thereafter he travelled from Pune to Goa by road and after completing his work in Goa, he came to Ahmedabad by Spiece Jet Airways Flight No.138. From Ahmedabad, he flew to Mumbai by Air India Flight No.AI191.

4] On 29.09.2013, the petitioner booked his ticket to Dhaka via Mumbai Kolkata by Jet Airways 9W615. The petitioner checked in his baggage and completed his security check. While on his way to board the flight by Air Coach, a Jet Airways employee

contacted the petitioner and informed that there was some problem with his luggage. The petitioner was taken to Luggage Screening Room. At that time, the other jet Airways as well as CISF employees were present near the scanner machine. The petitioner was asked to identify his bag and open it. In the said bag, there was toilet kit pouch. When the petitioner was asked to open the pouch, in that toilet kit pouch, alongwith regular toilet articles, five live cartridges and one empty was found.

5] On enquiry by CISF staff, the petitioner Immediately disclosed that the said live cartridges and empty belong to his brother Md Nasser. They were inadvertently carried by him as the travel kit pouch was common between him and his brother. From the Airport itself, the petitioner called upon his brother Md. Nasser to send fax copy of his licences to hold arm as well as live cartridges and empty. By fax said copies were received from the petitioner's brother. The petitioner handed them over to the CISF officer.

6] However, at the instance of CISF officer, C.R.No.16 of 2013 came to be registered against the petitioner for the offences punishable under Sections 3 and 25 of the Arms Act. The petitioner was arrested in pursuance of the said C.R. and

thereafter remanded to police custody and then to Magisterial Custody. After investigation, police filed charge sheet against the petitioner bearing C.C. No.301/PW/2015 in the Court of Metropolitan Magistrate, 66th Court, Andheri Mumbai.

7] The submission of learned counsel for the petitioner is that the petitioner has offered valid explanation for the five live cartridges and the one empty found in his toilet kit pouch. The petitioner has also produced on record Arm Licence issued to his brother and in such situation, as such the possession of the petitioner cannot be called as conscious possession as required under Section 3 and 25 of the Arms Act. Hence the criminal prosecution launched against the petitioner needs to be quashed and set aside.

8] In support of his submission, learned counsel for the petitioner has relied upon the judgment of the Constitution Bench of the Hon'ble Supreme Court, in case of **Sanjay Dutt -vs- State through CBI Bombay (1994) 5 SCC 410** and the judgment of Division Bench of this Court in **Nurit Toker -vs- State of Maharashtra, 2012 (2) Bom. C.R (Cri) 154.**

9] Learned APP appearing on behalf of the State, on the

other hand, has submitted that the issue as to whether the possession was conscious or not would be decided at the stage of trial and this Court, therefore, while exercising its jurisdiction under Article 226 of the Constitution of India, should not decide the issue and interfere with and set aside the F.I.R or the chargesheet.

10] After having heard learned counsel for the parties, we are of the view that the facts of this case clearly reveal that the possession of the petitioner was obviously not conscious. The petitioner has not only given immediate explanation as to how five live cartridges and one empty were found in his luggage as they were in the toilet kit pouch which was shared by him with his brother; the petitioner has also called for the arm licences held by his brother by fax and these arm licences were produced before CISF authority and before this Court also. These arm licences go to show that the petitioner's brother Md. Nasseir was holding N.PB. Revolver No.1342194 made in Germany, '32 bore and 50 rounds of bullets. He is also having arm licence of '22 bore Rifle No.A.355412 made in Germany with 100 rounds of bullets. Live cartridges and empty recovered from the luggage of the petitioner tallies completely with the description of the rounds mentioned in the arm licences of the petitioner's brother. It is not in dispute that the

petitioner was not carrying any weapon such as revolver or a pistol. Therefore, it is obvious that these live cartridges and the empty remained in the petitioner's baggage inadvertently on account of carrying the toilet kit pouch of his brother with him.

11] A bare perusal of Section 3 and 25 of the Arms Act clearly reveals that the term, '*possession*' used therein refers to '*conscious possession*' and '*not unconscious possession*' or '*inadvertent possession*'. As rightly submitted by learned counsel for the petitioner, the Hon'ble Supreme Court has, in case of *Sanjay Dutt (supra)*, clearly held that the possession of fire arm under Arms Act must be conscious possession with the knowledge and requisite mental element. Mere custody without awareness of the nature of such possession cannot fall under Sections 3 or 25 of the Arms Act. The relevant observations of the Hon'ble Supreme Court in the said judgment are as follows :-

“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 authorised 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”).

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

13] Similar view is taken by the Division Bench of this Court also in case of *Nurit Toker (supra)*; wherein two live cartridges were found in the baggage of the petitioner at the time of screening and hence the offence was registered against the petitioner therein under Sections 3 and 25 of the Arms Act. As it was pointed out that two live cartridges found in the baggage of the petitioner were the result of some mistake when the petitioner

started her journey; it was held that in the absence of the element of possession being conscious, she was rightly discharged/released by the police by filing report under Section 169 of the Code of Criminal Procedure.

14] In the present case, it is to be noted that the petitioner is permanent resident of Bangladesh. For the purpose of business, he has come to India and travelled at various places in India. Thereafter while he was returning, at the Airport, when in his toilet kit pouch these live cartridges and one empty were found in his luggage, he has called from his brother the copies of arm licences. As stated above, the live cartridges and empty recovered from his toilet kit pouch were tallying with the description of the weapon of the rounds given in the arm licences of his brother.

15] The F. I.R. as well as other material collected in the course of investigation reveals that apart from recovery of these cartridges and empty, there is no other material to show that the petitioner was in conscious possession thereof in his baggage. This being a case, it cannot be said that the petitioner was in conscious possession of those live cartridges or that he had control over the same.

16] Under the circumstances and in view of the legal position set out above, we are of the considered view that there is no sufficient material to proceed with the case against the petitioner for the offences punishable under Sections 3 and 25 of the Arms Act.

17] Thus, taking overall view of the matter, we are satisfied that this is a fit case where this Court can exercise its jurisdiction under Article 226 of the Constitution of India and also use its inherent powers under Section 482 of the Code of Criminal Procedure and quash the Criminal Case bearing No.301/PW/2015 pending against the petitioner in the Court of Metropolitan Magisterial 66th Court, Andheri, Mumbai.

18] Writ Petition is, therefore, allowed and the rule is made absolute in terms of prayer clause (a)

[DR.SHALINI PHANSALKAR-JOSHI, J.]

[RANJIT MORE, J.]