

\$~20 & 21 (*common order*)

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

Decided on: 29th May, 2017

+ W.P.(CRL) 1285/2017 and Crl.M.A.7121/2017

ABIGAIL LOUISA CLARK & ANR Petitioners

Through: Mr. Annirudh Sharma,
Advocate with petitioner no.1 &
Ms. Anju Raheja, AR of Petitioner no.2.

versus

STATE NCT OF DELHI & ANR Respondents

Through: Mr.R.S. Kundu, ASC (Crl.) for
Ms. Richa Kapoor, ASC (Crl.)

+ W.P.(CRL) 1453/2017

ERIC KAMAU MULHAI KENYATTA Petitioner

Through: Mr. Partap Singh, Advocate
along with petitioner in person.

versus

STATE NCT OF DELHI Respondent

Through: Mr.R.S. Kundu, ASC (Crl.) for
Ms. Richa Kapoor, ASC (Crl.)

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. Both these cases have given rise to identical questions for consideration, the prayer made invoking Article 226 of the Constitution of India read with Section 482 of the Code of Criminal

Procedure, 1973 (Cr.P.C.) being similar, in almost identical set of facts and circumstances. They have been heard together and are being decided through this common order.

2. The petitioner in the first above mentioned case is a citizen of United Kingdom (UK) who had travelled to India on British passport on valid visa and was returning to London via Abu-Dhabi by Etihad airways flight No.EY-229 on 18.04.2017. She had checked in baggage which was discovered upon x-ray scrutiny in to contain a live cartridge of 5.6 cm with diameter of 0.9 cm. On the report of Airport Operation Manager of the airlines, First Information Report (FIR) No.130/2017 under the Section 25 of the Arms Act, 1959 was registered in Police Station IGI Airport, New Delhi.

3. The petitioner in the second captioned matter is a Kenyan national who had travelled to India on valid passport issued by the authorities of Republic of Kenya on valid visa and was returning from India on 10.03.2017 by flight No.EK-517 and upon screening of his baggage it was found that it contained one live cartridge of the caliber 9 x 19 mm. On report of Sub Inspector of Central Industrial Security Force (CISF), case FIR No.84/2017 was registered in Police Station IGI Airport for offence under Section 25 of the Arms Act, 1959.

4. Both the petitioners have approached this court, through the respective petitions at hand, seeking quashing of the aforesaid FIRs, *inter alia*, submitting that the cartridges in question found in their respective baggage were not in their conscious possession and, therefore, there are no intentional acts of commission or omission

committed by them as would constitute an offence under Section 25 of the Arms Act.

5. It has been submitted that the petitioner in the first captioned case is a 23 years' old native of England, who has been actively involved in charity work in India, having volunteered to work on International Development Programme in a large number of countries, coming to India to work with an Indian organization named *Pravah* in association with its sister concern, it being Voluntary Service Overseas (VSO), a charity registered in England and Wales in U.K. (the second petitioner) and during her stay, on valid visa, here she having rendered assistance in a village in the State of Rajasthan in the areas of sanitization, education, etc. It is explained by her that she had come to India on 23.01.2017 after having travelled to Australia on a work visa, having worked at a cattle ranch there with a group of people who were co-workers and used to carry fire-arms, as permitted by the local laws in that country, and that during said engagement, her bag had been used by her said co-workers for carrying food and equipment. She states that from Australia, she had returned to UK and then had travelled to India but she was never stopped nor informed about the presence of any such article in her bag and the discovery of the live cartridge was made only after she had handed over the baggage to the airlines staff on the date the case was registered.

6. The other petitioner, in the second matter, has explained that he had come to India, on a valid visa, with his wife with the object of arranging her medical treatment in hospital in Gurgaon (Haryana) and

that, in his native State, he holds a valid license for fire arm and that the cartridge had come in his baggage by mistake, there being no intention nor he being aware of its presence in the baggage during travel. His passport was withheld by the local police, and therefore, he was constrained to move an application before the Additional Chief Metropolitan Magistrate (ACMM) for permission to leave the country which was allowed but conditions were imposed wherein he has been obliged to deposit amount in the sum of Rs.1 lac for return of the passport and a fixed deposit receipt of Rs.5 lacs has been furnished with undertaking that he would not violate the conditions permitting such travel.

7. Notice was issued on both these petitions and, in response, status reports were filed on 12.05.2017 and 13.05.2017 respectively. Both these matters were heard against the backdrop of such reports on 26.05.2017 when the learned Additional Standing Counsel, on instructions, from the investigating agency fairly conceded that the investigation in both these cases was complete except for obtaining the report of the ballistic expert and for requisite sanction for prosecution under the Arms Act. She fairly conceded that the report of the investigating agency, with opinion of the evidence gathered, particularly taking in view the contentions urged in defence by the respective petitioners, would be finalized and copy of such reports submitted in the court by today in these cases for the petitions to be considered on merits.

8. These cases have come up for hearing today against the backdrop of above facts. Status reports have been submitted in each case. The learned counsel on both sides have been heard and the record has been perused.

9. In the first captioned case, the purpose of the visit of the petitioner to India has been confirmed, *inter alia*, by recording statements of the persons connected with the host organization. The status report itself indicates that upon discovery of the cartridge being made, the petitioner had expressed ignorance about its presence and had explained that it could be inadvertent as she did not have either knowledge or intent. It, however, is added that the petitioner could not provide any evidence regarding the source of the cartridge. The status report in the second captioned case confirms that the police has verified the fact that the petitioner in question holds a valid fire arms license in the Republic of Kenya. The ballistic report in both the cases is still awaited. It may be assumed that the ballistic reports would only confirm that the articles in questions are ammunition within the meaning of provision contained in Section 2(b) of the Arms Act, 1959.

10. The submissions of the learned Additional Standing Counsel for respondent/State also show that the police is yet to approach the competent authority for sanction under Section 39 of the Arms Act. Necessarily, the matter would be placed before the competent sanctioning authority under Section 39 of the Arms Act only after the ballistic reports confirming the fact that the articles in question are ammunition as defined in the law has been obtained. It has to be

borne in mind that the petitioners are foreign nationals who are in India on valid visas and were on their way out when intercepted. But for the discovery of the one live cartridge each in their respective baggage, there is no allegation of their involvement in any criminal or other offending activity on Indian soil so as to put them under the constraint of continuing in India beyond the period of their intended stay.

11. In these circumstances, it is deemed just and proper that their plea for cases to be quashed be considered on the basis of the reports of investigation which is complete except for ballistic reports and sanction for prosecution.

12. The offence under Section 25 of the Arms Act which has been registered in each case has been invoked against the petitioners on account of same having been found in their respective baggage, the allegations essentially being that they had the possession of such ammunition which undoubtedly, by itself, would be an offence provided the evidence also shows such possession to be a “conscious possession”. {*Gunwantlal vs. the State of Madhya Pradesh*, (1972) 2 SCC 194}. It is against similar backdrop that in an identically placed case, referred to a division bench of this court, on a question of law, judgment was rendered on 01.12.2014 reported as *Gaganjot Singh vs. State*, 2014 SCC OnLine Del 6885. The division bench took note of the decision in *Gunwantlal* (supra), as also the view taken in *Sanjay Dutt vs. State through CBI*, (1994) 5 SCC 410, accepting the plea of the petitioner in said case that the live cartridge found in his baggage

was there without he being aware of it and observing that since charge could be framed only when there is reasonable suspicion or sufficient material of the alleged offender having committed the offence, the requisite ingredients of conscious possession being missing, the proceedings in the criminal case against the petitioner in that matter were quashed.

13. The above view has been followed by this court in a series of subsequent cases, some of which include *Sandeep Mukherjee vs. State (NCT of Delhi)* 2017 SCC OnLine Del 7888; *Jaswinder Singh vs. State*, 2015 SCC OnLine Del 10894; *Sonam Chaudhary vs. The State (Govt. of NCT of Delhi)* 2016 SCC OnLine Del 47; and *Alka Raj vs. State*, W.P. (Crl.) 3341/2016, decided on 30.11.2016.

14. While discussing the contours of the power of this court in the writ jurisdiction to quash criminal proceedings, in another judgment of a division bench of this court reported as *Sangeeta & Ors. vs. The State & Ors.*, 2002 (1) JCC 676, it was observed thus:-

“ 9. What is the extent of inherent and writ power of this court in the circumstances and on what grounds it was exercisable and whether availability of an alternative remedy of revision operated as a bar in this regard is no more a res integra and is by and large settled by a series of Supreme Court judgments though to quote those would be to repeat what had been stated very often. Suffice it to say that consensual view, barring minor diversions here and there dictated by the circumstances of a case gathered from the relevant judgments was that the High Court enjoyed the inherent and the writ power to quash a complaint/FIR and even a summoning order and the on-going criminal proceedings where it felt satisfied that uncontroverted allegations made in the complaint and the

supporting material gathered at investigation, even when taken on the face value did not make out or constitute the alleged offences or that the action was attended by complainant's mala fides, personal grudge or vengeance or was frivolous and vexatious, tantamounting to abuse of process of court or where its continuation would not serve the ends of justice."

(emphasis supplied)

15. The averments made in the FIRs in both these cases do not indicate anything even remotely suggesting conscious possession. Noticeably, in the first case the petitioner had even handed over her baggage which was found to contain the live ammunition for being carried in the cargo of the plane. In the other case, the fact that the petitioner holds a valid fire arm licence in his native State has been confirmed. The possession of live ammunition by itself may be an offence but it would be of no use to the petitioner without a corresponding fire arm. In these circumstances, the theory of it having continued to be lying in his baggage from native country to India through the short travel here is highly probable and cannot be ruled out.

16. The learned Additional Standing Counsel fairly conceded that the investigation in both the cases has not thrown up any evidence suggesting the petitioners were aware of the presence of the ammunition in their respective baggage. Thus, in this view, carrying of the ammunition in the baggage cannot be described as conscious possession so as to constitute the offence under Section 25 of the Arms Act.

17. For the foregoing reasons, the petitions are allowed. The proceedings arising out of FIR No.130/2017 under the Section 25 of the Arms Act, 1959 of Police Station IGI Airport, New Delhi against the first petitioner and the proceedings arising out of FIR No.84/2017, under Section 25 of the Arms Act, 1959 of Police Station IGI Airport against the second petitioner are hereby quashed.

18. Having regard to frequency of registration of such cases as at hand, it will be in the fitness of things that the Ministry of External Affairs sends a communication to all Embassies, Consulates or High Commissions in India advising foreign nationals travelling to this country as to the desirability to bear in mind the local laws, particularly such laws as Arms Act so that inadvertent infractions of this kind as were the subject matter of these cases do not recur.

19. A copy of the order be given *Dasti* to the each of the parties and also be sent to Ministry of External Affairs, Government of India, as indeed to the concerned courts of Metropolitan Magistrate.

R.K.GAUBA, J.

MAY 29, 2017

vk